



D U T I E S
OF
SHERIFFS AND CONSTABLES

PARTICULARLY UNDER THE PRACTICE IN
CALIFORNIA AND THE PACIFIC
STATES AND TERRITORIES.

W I T H
PRACTICAL FORMS FOR OFFICIAL USE.

BY
W. S. HARLOW.

THIRD EDITION — REVISED.

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PREFACE TO THE THIRD EDITION.

IN the preparation of this volume the author has aimed to furnish, as a guide to sheriffs and constables, the laws of the state of California relating to their official duties, with such interpretations of those laws as have been made by the supreme court of California, together with such observations and suggestions concerning the duties of officers as the writer has stored up in an experience of twenty-seven years of uninterrupted service in the sheriff's office in this state.

In the present edition the text has been rewritten and largely amplified on nearly every subject treated, and the whole work has been rearranged. The number of sections has been almost doubled, the additions being taken up, to a great extent, by recent decisions and by code provisions not incorporated in the former editions.

While the result of nearly thirty years' active experience of the author in the sheriff's office has been given to this work, my aim in the present revision has been to make it not only a valuable one for the sheriff and constable, but also for the practicing attorney, as to all matters with which these officers have to deal.

W. S. HARLOW.

OAKLAND, CAL., June 1, 1907.

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CHAPTER I.

ORIGIN AND GENERAL DUTIES.

- § 1. Origin of the office.
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- § 3. Duties in the United States.

§ 1. **Origin of the office.** The office of sheriff is one of great antiquity, one of the most ancient of all those existing under our form of government. The word "sheriff" has its origin in two Saxon words, —*scir*, denoting shire, or county, and *gerefa*, reeve, or bailiff. When the British kingdom was first subdivided into counties or shires, the custody of each shire is said to have been committed to an earl, whose deputy was known in Latin as *vice-comes*. When the earl, by reason of other high employments, became relieved of all active duty as to the affairs of the county, his labor was laid on the sheriff, who became the representative of the king, and was the "first man of the county," superior in rank to any nobleman within its limits, during his term of office. (1 *Blackstone*, pp. 339, 343.) Originally the sheriff's duties were necessarily both ministerial and judicial, but in later years, by relegation of the judicial functions to the various courts, his essential and appropriate duties have been as "keeper of the king's peace, ministerial officer of the superior courts, and king's bailiff," although he has still continued to exercise,

to some extent and in certain cases, the powers of a judge. In Scotland the sheriff is still properly a judge, but with limited ministerial powers, and in London he holds what is known as the sheriff's high court, having cognizance of certain personal actions.

§ 2. **Duties at common law.** The sheriff is the chief executive officer of the county. At common law it was his duty to execute all process that issued from its courts, carrying into effect their judgments within his own county, except where he is a party, in which case the coroner acts in his stead. It is also his duty to take charge of all prisoners pending trial, and to execute the sentence of the court, to take charge of the county jail and protect it against all rioters, and to seize and take charge of all escheats, wrecks, estrays, and the like. He is the chief conservator of the public peace, and it is his duty not only to preserve the peace, but to apprehend and commit to prison all persons who break the peace or attempt to do so, and also to pursue and arrest criminals and escapes, calling the *posse comitatus*, if necessary, in the execution of these or any of his duties. At common law he also possessed extensive judicial functions, in summoning sheriff's juries and holding courts of inquiry to estimate damages or determine ownership; but this class of powers is in this country greatly limited, or entirely done away with, by the various statutory provisions prescribing his powers and duties. His jurisdiction is generally bounded by his own county, but he may pursue escapes and perform mere ministerial acts out of the county. (*Bouvier's Law Dict.*, title "Sheriffs"; 22 *Am. & Eng. Encyc. of Law*, p. 525.) .

§ 3. **Duties in the United States.** In our country the duties of the sheriff are in most states prescribed by code or statutory provisions, but are substantially the same as at common law. Some of the common-law powers and duties have been curtailed or entirely taken away, such as judicial powers and duties as to estrays, and other special powers and duties have been added.

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§ 4. **Who are eligible.** No person is eligible to office who, at the time of his election, is not of the age of twenty-one years, or over, a citizen of the state, and an elector of the county. (*California. County Govt. Bill, sec. 56; Stats. 1907, p. 363.*)

§ 5. **Election and term of office.** The sheriff is elected at the general state election in November, for a term of four years, and takes office at twelve o'clock meridian on the first Monday after the first day of January next succeeding his election. He holds his office until his successor is elected or appointed and qualified. (*California. County Govt. Bill, sec. 60; Stats. 1907, p. 362.*)

§ 6. **Oath of office.** Before entering on the duties of his office, the sheriff must take and subscribe the following oath: "I do swear [or affirm] that I will support the constitution of the United States and the constitution of the state of California, and that I will faithfully discharge the duties of the office of sheriff according to the best of my ability." This oath may be taken before any officer authorized to administer oaths, and must be subscribed and filed with the county clerk within ten days after he has notice of his election, or before the expiration of fifteen days from the commencement of his term of office, when no such notice has been given. (*California. Pol. Code, secs. 704, 707, 708, 709.*)

§ 7. **Official bond.** The sheriff must give an official bond in the amount prescribed by the board of supervisors, which bond must be approved in writing by the judge, or judges, if there be more than one, of the superior court, recorded in the office of the county recorder, and filed in the office of the county clerk within the time prescribed for filing his oath of office. The condition of the bond must be that the principal will well, truly, and faithfully perform all official duties then required of him by law, and also all such additional duties as may be imposed on him by any law of the state of California. Such bond must be signed by the principal and at least two sureties. All persons offered as sureties shall be examined, on oath, touching their qualifications, and no person can be admitted as surety on any such bond unless he is a resident and freeholder or householder within the state, and is worth in real or personal property, or both, situate in this state, the amount of his under-

taking, over and above all sums for which he is already liable, exclusive of property exempt from execution and forced sale. Neither the county clerk, tax-collector, treasurer, recorder, auditor, assessor, district attorney, nor a member of the board of supervisors of the same county, shall be accepted as a surety. (*California. County Govt. Bill, sec. 69; Stats. 1907, p. 362. Also, Pol. Code, secs. 944, 947, 952, 955.*)

§ 8. **Special liability on bond.** “Whenever, except in criminal prosecutions, any special penalty, forfeiture, or liability is imposed on any officer for non-performance or malperformance of official duties, the liability therefor attaches to the official bond of such officer, and to the principal and sureties thereon.” (*California. County Govt. Bill, sec. 64; Stats. 1893, p. 367.*)

§ 9. **Bond of ex officio officer.** When, by statute, the sheriff is *ex officio* tax-collector, he must give a separate bond for each office. (*People v. Burkhardt, 76 Cal. 606, 18 Pac. 776.*)

§ 10. **Assuming office without having qualified.** “Every person who exercises any function of a public office without taking the oath of office, or without giving the required bond, is guilty of a misdemeanor.” (*California. Pen. Code, sec. 65.*)

§ 11. **Exercising functions of office wrongfully.** “Every person who willfully and knowingly intrudes himself into any public office to which he has not been elected or appointed, and every person who,

having been an executive officer, willfully exercises any of the functions of his office after his term has expired, and a successor has been elected or appointed and has qualified, is guilty of a misdemeanor." (*California. Pen. Code, sec. 75.*)

§ 12. **Consolidation with tax-collector.** In counties where the board of supervisors, by proper ordinance, may so elect, the duties of sheriff and tax-collector may be consolidated; and in counties where the duties of said officers have been, or may hereafter be, consolidated, in either manner above designated, the board of supervisors thereof, by proper ordinance, may elect to separate the duties so consolidated, and reconsolidate them in any other manner above provided, or may separate said duties without reconsolidation, and provide that the duties of each office shall be performed by a separate person, whenever in their discretion the public interest will be best subserved thereby. When such offices are united and consolidated, the person elected to fill the offices so united and consolidated must take the oath and give the bond required for each, discharge all the duties pertaining to each, and receive the compensation affixed to the offices. (*California. County Govt. Bill, secs. 57, 59; Stats. 1893, pp. 366, 367.*)

§ 13. **Qualification and appointment of deputies.** The sheriff may appoint as many deputies as may be necessary for the prompt and faithful discharge of the duties of his office. Such appointment must be made in writing, and filed in the office of the county clerk; and until such appointment is so made and

filed, and until such deputy shall have taken the oath of office, no one shall be or act as such deputy. Deputies must be citizens of the United States. No county officer must be appointed or act as the deputy of another officer of the same county, except in cases where the pay of the officer so appointed amounts to a sum less than seventy-five dollars per month. (*California. County Govt. Bill, sec. 60; Stats. 1907, p. 363; Stats. 1880, p. 23; also, Pol. Code, sec. 843.*)

§ 14. **Oath and bond of deputy.** All deputies must, within ten days after receiving notice of their appointment, take and file an oath in the manner required of their principals, and may be required to give an official bond in a sum to be fixed by the sheriff. (*California. Pol. Code, secs. 910, 985.*)

§ 15. **Powers and duties of deputies.** A deputy has the same powers and duties as his principal, and whenever the official name of any principal officer is used in any law conferring power, or imposing duties or liabilities, it includes deputies. (*California. County Govt. Bill, sec. 62; Stats. 1893, p. 367; also, Pol. Code, sec. 865.*)

§ 16. **Deputies for new courts—Salary.** In counties where the number of judges of the superior court has been increased since January 1, 1887, or shall thereafter be increased, the sheriff is allowed an additional deputy for each additional judge, his salary to be \$125 per month, payable out of the county treasury. (*California. Stats. 1893, p. 507.*)

§ 17. **Liability for acts of deputy.** The sheriff and his sureties are responsible for all official neglect

or misconduct of his deputies, and also for his acts not required by law, where he assumes to act under color or by virtue of his office. (5 *Am. & Eng. Ency. of Law*, p. 634.) A trespass committed by a deputy sheriff, in his official character, is considered in law as committed directly and personally by his principal, and the latter is liable therefor. (*Hirsch v. Rand*, 39 *Cal.* 315; *Whitney v. Butterfield*, 13 *Cal.* 335, 73 *Am. Dec.* 584.)

§ 18. **Buying appointments to office.** "Every person who gives or offers any gratuity or reward, in consideration that he or any other person shall be appointed to any public office, or shall be permitted to exercise or discharge the duties thereof, is guilty of a misdemeanor." (*California. Pen. Code*, sec. 73.)

§ 19. **Taking rewards for deputation.** "Every public officer who, for any gratuity or reward, appoints another person to a public office, or permits another person to exercise or discharge any of the duties of his office, is punishable by a fine not exceeding five thousand dollars, and, in addition thereto, forfeits his office, and is forever disqualified from holding any office in this state." (*California. Pen. Code*, sec. 74.)

§ 20. **Office hours.** Section 4116 of the Political Code provides: "Sheriffs, clerks, recorders, treasurers, and auditors must have their offices at the county seat, in the courthouse, hall of records, jail or other buildings, provided by the county through the board of supervisors, and keep them open for

the transaction of business continuously from nine o'clock A. M. until five o'clock P. M. every day in the year except Sundays and holidays"; and such officers must make an affidavit to the auditor that such requirement has been complied with, and false affidavit is punishable as perjury. (*California. County Govt. Bill, secs. 63, 66; Stats. 1907, p. 556; also, Pol. Code, secs. 4116, 4119.*)

§ 21. **Saturday half-holiday.** "Every Saturday from twelve o'clock noon until twelve o'clock midnight is a holiday as regards the transaction of business in the public offices of this state, and also in political divisions thereof where laws, ordinances, or charters provide that public offices may be closed on holidays; *provided*, this shall not be construed to prevent or invalidate the issuance, filing, service, execution, or recording of any legal process or written instrument whatever on such Saturday afternoons." (*California. Pol. Code, sec. 10, amended March 10, 1905.*)

§ 22. **Records open to inspection.** The public records and other matters in the office of the sheriff are at all times, during office hours, to be open to the inspection of any citizen of the state. (*California. Pol. Code, sec. 1032.*)

§ 23. **General duties.** "The sheriff must:—

"1. Preserve the peace.

"2. Arrest and take before the nearest magistrate, for examination, all persons who attempt to commit or who have committed a public offense.

"3. Prevent and suppress any affrays, breaches of the peace, riots, and insurrections which may come to his knowledge.

"4. Attend all superior courts held within his county and obey all lawful orders and directions of all courts held within his county.

"5. Command the aid of as many male inhabitants of his county as he may think necessary in the execution of these duties.

"6. Take charge of and keep the county jail and the prisoners therein.

"7. Release on the record all attachments of real property when the attachment placed in his hand has been released or discharged.

"8. Indorse upon all process and notices the year, month, day, hour, and minute of reception, and issue therefor to the person delivering it, on payment of fees, a certificate showing the names of the parties, title of paper, and time when received.

"9. Serve all process and notices in the manner prescribed by law.

"10. Certify under his hand upon process or notices the manner and time of service, or, if he fails to make service, the reasons of his failure, and return the same without delay." (*California. County Govt. Bill, sec. 93; Stats. 1907, p. 401.*)

§ 24. **Process and notice defined.** "Process" includes all writs, warrants, summons, and orders of courts of justice, or judicial officers. "Notice" includes all papers and orders (except process) required to be served in any proceeding before any court, board, or officer, or when required by law to

be served independently of such proceeding. (*California. County Govt. Bill, sec. 92; Stats. 1893, p. 371; also, Pol. Code, sec. 4175.*)

§ 25. **Resistance to process — Posse comitatus.** “When a sheriff, or other public officer authorized to execute process, finds, or has reason to apprehend that resistance will be made to the execution of the process, he may command as many male inhabitants of his county as he may think proper to assist him in overcoming the resistance, and, if necessary, in seizing, arresting, and confining the persons resisting, their aiders and abettors. The officer must certify to the court from which the process issued the names of the persons resisting, that they may be proceeded against in due time for their contempt of court. If it appears to the governor that the civil power of any county is not sufficient to enable the sheriff to execute process delivered to him, he must, upon the application of such sheriff, order such portion as shall be sufficient, or the whole, if necessary, of the organized national guard or enrolled militia of the state, to proceed to the assistance of the sheriff.” (*California. Pen. Code, secs. 723-725.*)

§ 26. **Sheriff to act as court bailiff.** The sheriff, in attendance upon court, must act as the crier thereof, call the parties and witnesses, and all other persons bound to appear at the court, and make proclamation of the opening and adjournment of the court, and of any other matter under its direction. (*California. County Govt. Bill, sec. 106; Stats. 1907, p. 403.*)

§ 27. **Summoning jurors.** Jurors for courts of record are summoned by the sheriff "by giving personal notice to that effect to each of them, or by leaving a written notice to that effect at his place of residence, with some person of proper age." (*California. Code Civ. Proc., sec. 225.*)

§ 28. **Summons to jurors by mail not good.** In *People v. Burgess*, 153 N. Y. 561, 47 N. E. 889, the sheriff had summoned the jurors drawn, by mailing a notice thereof to them, inclosing a card to be signed and returned, admitting service of the notice. "It is very clear," said the court, "that the sheriff did not conform to these provisions in notifying the persons who had been drawn as jurors to attend at that term of court. Instead of following this form of service provided by the statute, he adopted another form of his own device, which the statute did not recognize, and which left the court without the power to compel the attendance of a single juror. But we are inclined to the view that in this case no harm was done, for the reason that all of the jurors drawn, who were qualified to sit, personally appeared in court at the time appointed."

§ 29. **Misconduct of jurors.** One of the grounds upon which a reversal of judgment was asked for in the case of *Feary v. Metropolitan St. Ry. Co.*, 162 Mo. 75, 62 S. W. 452, was because of alleged misconduct of a juror, and the court found it no reversible error, as follows: "Because the jury misbehaved, in that some of the members of the same played cards with one of defendant's attorneys during the progress of the trial, we would not be pre-

pared to agree with the argument that a judgment should be reversed because a trial judge played a game of cards during adjournment with an attorney who was interested in a case on trial before the court, and the same principle applies to a juror. Lawyers and jurors generally reside in the same bailiwick, are acquainted with each other, meet frequently during the term of court, sometimes eat and sleep in the same tavern. The trial judge often does the same, and sometimes he is the guest of an attorney who has cases before the court. But it never occurred to them, perhaps, that they were thereby laying the foundation for a reversal of their cases. It takes something more—some corrupt act, or act strongly pointing to positive turpitude, to upset a verdict for misconduct.”

When a jury retires to deliberate upon a verdict “an officer must be sworn to keep them together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor to do so himself, unless by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed, or when ordered by the court.” (*California. Pen. Code, sec. 1128.*)

Verdicts are not infrequently attacked and sometimes set aside through the culpable conduct of officers in charge of juries. In *State v. La Grange*, 99 Iowa, 10, 68 N. W. Rep. 557, the court animadverting upon the misconduct of a bailiff and jury, said:—

“But in this case the jury was guilty of misconduct in asking of the bailiff information he was forbidden to communicate, and in permitting him to give it, and to advise the jury, and to repeat remarks in re-

gard to the case made by the trial judge. The bailiff was guilty of misconduct in talking with the jury, excepting to ascertain if it had agreed upon a verdict, and what he said was of a nature to unduly influence an agreement. It was the right of the defendant to have a verdict which should be the result of the deliberation of the jury, controlled alone by evidence and the charge given by the court, unaffected by unauthorized statements of the views of the judge, or his intentions in regard to keeping the jurors together." In *Cole v. Swan*, 4 G. Greene, 32, it was said: "Officers having a jury in charge while they are deliberating upon their verdict should never speak to them, except to ask them whether they have agreed. Any conversation by the officer ought to subject him to severe punishment by the court, and any verdict returned after such conversation, whether it had any influence or not in producing the verdict, ought to be set aside the moment the fact comes to the knowledge of the court."

Where the bailiff remained with the jury in the jury-room all night, while they were considering the case and deliberating upon their verdict, talked with different jurors, answered questions concerning the case, and, when one juror declined to vote until further consideration, threatened to report him to the court, and have him fined, it was such misconduct of the bailiff as to vitiate the verdict. (*Weston v. Neathammer*, 180 Ill. 150, 54 N. E. Rep. 310.)

Where, while a jury was considering a case, the sheriff called to the bailiff having them in charge that the judge would leave for his home in a few minutes, and, unless they returned a verdict at once, they would be held until another day, such conduct

was ground for reversal, the action of the sheriff being presumed prejudicial. (*Shaw v. State*, 79 *Miss.* 577, 31 *South.* 209.)

§ 30. **Care of jury.** Defendant J. S. Wormly was convicted of the murder of Anthony T. Robion. He moved for a new trial on the ground that the verdict was not warranted by the evidence, and that there was great misbehavior on the part of the sheriff and the jury—the latter being permitted to converse and drink spirituous liquors with several persons during the absence of the sheriff, and without the permission or authority of the court. The motion was granted. The court said: “The court is of opinion that the conduct of the sheriff in withdrawing from the jury at the house of Mr. Cheatham, and leaving them in the parlor in company with three other gentlemen, as is set forth in the record, was sufficient to vitiate the verdict of the jury. The court deems it proper to add, that the conduct of the sheriff in conducting the jury to the house of Mr. Cheatham, and withdrawing from them under the circumstances disclosed by the evidence, was such misbehavior on the part of that officer as to deserve the animadversion and censure of the court. The act should be condemned, because its tendency is to impair the purity of the trial by jury in criminal cases.”

Jurors conversing with parties while the case is under consideration by them will be good ground for a new trial. (*Nelms v. State*, 13 *Smedes & M.* 500, 53 *Am. Dec.* 94.)

§ 31. **Diligence required in service of process.** The supreme court of California has declared, in

the case of *Whitney v. Butterfield*, 13 Cal. 336, 73 Am. Dec. 584, that in the service of process the sheriff is responsible only for unreasonably, or not reasonably, executing it; that he is not bound to start on the instant of receiving a writ to execute it, without regard to anything else.

“The sheriff’s liability rests on his breach of official duty. As he is bound to perform his duty, so is he responsible to every one who may be injured by his failure to discharge it. In respect to the execution of process, these official duties are well defined by law. The law is reasonable in this, as in all other things. It holds public officers to a strict performance of their respective duties. It tolerates no wanton disregard of these duties. It sanctions no negligence; but it requires no impossibilities and imposes no unconscionable exactions. When process of attachment or execution comes to the hands of the sheriff, he must obey the exigency of the writ. He must, in such cases, execute the writ with all reasonable celerity. Whenever he can make the money on execution, or secure the debt by attachment, he must do it. But he is not held to the duty of starting on the instant after receiving a writ, to execute it, without regard to anything else than its instant execution. Reasonable diligence is all that is required of him in such instances. But this reasonable diligence depends upon the particular facts in connection with the duty. If, for example, a sheriff has execution against A, and has no special instruction to execute it at once, and there is no apparent necessity for its immediate execution, it would not be contended that he was under the same obligations to execute it instantaneously as if he were so instructed and there

were circumstances of urgency. So in respect to an attachment. If an attachment were sued out on the ground of a defendant's fraud, or his being in the act of leaving the state, or removing his property, the very fact of the issuance of the attachment, or the making of the affidavit, would seem to indicate to the officer the necessity of immediate action. But generally, in the absence of special circumstances, an attachment issued for the security of a debt, under the old statute authorizing such a process, does not stand upon a more favorable footing, so far as regards the necessity of immediate service, than an execution.

"It is true the statute (Wood's Dig. 183, sec. 125) directs that the sheriff 'shall execute the writ of attachment without delay'; but this was not intended to introduce a new rule. The expression 'without delay' does not mean that the sheriff shall, the instant he receives process of this sort, lay aside all other business and proceed to execute it, unless some special reasons of urgency exist. The rule is thus stated by the supreme court of New York in *Hinman v. Borden*, 10 Wend. 367, 25 Am. Dec. 545: 'A sheriff is bound to use all reasonable endeavors to execute process.' It is true that some authorities hold the rule with more strictness. In *Lindsay's Executors v. Armfield*, 3 Hawks (N. C.), 548, 14 Am. Dec. 603, the sheriff was held liable for not levying from 7th October to 1st November, following—no explanation being offered for the failure. Mr. Justice Hall says 'the law declares it to be the duty of the sheriff to execute all process which comes to his hands, with the utmost expedition, or as soon after it comes into his hands as the nature of the case admits,' and cites Bacon Abridg. Sheriff N. That

author holds the doctrine in the same language as that quoted. Mr. Justice Henderson, in the case in *Hawks*, states the doctrine a little differently. He says: 'The sheriff should proceed with all convenient speed to levy the execution.' The learned American editor of *Bacon* cites, in support of the doctrine of the text, several cases, which we have examined. None of them sustains the rule in its strictness, even if we are to regard the doctrine of *Bacon* as laying down a different rule, so far as the liability of the sheriff is concerned, from that held in *Wendell* and other cases; for *Bacon* says the 'sheriff must not show any favor, nor be guilty of *unreasonable delay*.' In *Kennedy v. Brent*, 6 Cranch. 187, 3 L. ed. 194, Marshall, C. J., holds that the marshal is bound to serve the process as soon as he reasonably can.

"The question of unreasonable delay is a mixed question of law and fact, each case depending on its own circumstances."

§ 32. **Liability for delay.** "If a sheriff does not return a process or notice in his possession, with the necessary indorsement thereon, without delay, he is liable to the party aggrieved for the sum of two hundred dollars, and for all damages sustained by him.

"If the sheriff, to whom a writ of execution is delivered, neglects or refuses, after being required by the creditor or his attorney, the fees having first been paid or tendered, to levy upon or sell any property of the party charged in the writ, which is liable to be levied upon and sold, he is liable to the creditor for the value of such property." (*California. County Govt. Bill, secs. 96, 97; Pol. Code, secs. 4179, 4180.*)

§ 33. **Specially conferred powers and duties.** In addition to the general duties of the sheriff as prescribed by the general statutes relating to the office, he has such other powers and duties as may be imposed upon him by any other statutes, in the execution of which his services may be required. It is sometimes enacted into a code or statutory provision that "the sheriff must perform such other duties as are required of him by law." (*California. Stats.* 1893, p. 374; *Pol. Code*, sec. 4193.)

§ 34. **Attendance upon supervisors.** The board of supervisors shall have power to direct the sheriff to attend, in person or by deputy, all the meetings of the board, to preserve order, serve notices, subpœnas, citations, or other process, as directed by the board. (*California. County Govt. Bill*, secs. 27, 29; *Stats.* 1893, p. 360; *Pol. Code*, sec. 4047.)

§ 35. **Process of court-martial.** "Every sheriff and constable must serve all orders, subpœnas, or process delivered to him for that purpose by any member of a court-martial." (*California. Pol. Code*, sec. 2084.)

§ 36. **Duties as to wrecks.** "The sheriff in each county must give all possible aid and assistance to vessels stranded on its coast, and to the persons on board the same, and exert himself to save and preserve such persons, vessels, and their cargoes, and all goods and merchandise which may be cast by the sea upon the land, and to this end may employ as many persons as he may think proper. All citizens must aid the sheriff when required.

“The sheriff of every county in which any wrecked property is found, when no owner or other person entitled to possession appears, must take possession of it in the name of the people, cause the value thereof to be appraised by disinterested persons, and keep it in some safe place to answer the owner’s claims,” and dispose of it only in the manner provided by law. (*California. Pol. Code, secs. 2403, 2406-2418.*)

§ 37. **Removal of intruders on state waste lands.** “If any person, under any pretense of any claim inconsistent with the sovereignty and jurisdiction of the state, intrudes upon any of the waste or ungranted lands of the state, the district attorney of the county must immediately report the same to the governor, who must thereupon, by a written order, direct the sheriff of the county to remove the intruder; and if resistance to the execution of the order is made or threatened, the sheriff may call to his aid the power of the county, as in cases of resistance to the writs of the people.” (*California. Pol. Code, sec. 42.*)

§ 38. **To provide rooms for courts and judges—**
When. If suitable rooms for holding the superior courts, and the chambers of the judges of said courts, are not provided in any county by the supervisors thereof, together with attendants, furniture, fuel, lights, and stationery sufficient for the transaction of business, the courts or the judge or judges thereof may direct the sheriff of the county to provide such rooms, attendants, furniture, fuel, lights, and stationery, and the expenses thereof are a charge against such county. (*California. Code Civ. Proc., sec. 144; Stats. 1907, p. 680.*)

Under this statute, the court can only require the sheriff to provide such quarters as the court "presently requires for the transaction of its business," and cannot interfere with a contract for a courthouse in course of erection. (*Los Angeles County v. Superior Court*, 93 Cal. 380, 28 Pac. 1062.)

§ 39. **Sheriff as auctioneer.** "In any city or town where there is no auctioneer, the sheriff or a constable thereof is *ex officio* auctioneer, and is permitted to sell any property, real or personal, at public auction; and for any delinquency as such *ex officio* auctioneer he is liable on his official bond." (*California. Pol. Code, sec. 3291.*)

§ 40. **Prevention of offenses.** It is the duty of the sheriff to prevent and suppress all affrays, breaches of the peace, riots, and insurrections which may come to his knowledge, and to arrest and take before the nearest magistrate, for examination, all persons who attempt to commit or who have committed a public offense. (*California. County Govt. Bill, sec. 93; Stats. 1893, p. 372; Pen. Code, sec. 697.*)

§ 41. **Prevention of duels.** If the sheriff has knowledge of the intention on the part of any persons to fight a duel, and does not exert his official authority to arrest the party and prevent the duel, he is punishable by fine not exceeding one thousand dollars. (*California. Pen. Code, sec. 230.*)

§ 42. **Suppression of riots — Posse comitatus.** "When any number of persons, whether armed or not, are unlawfully or riotously assembled, the sheriff

of the county and his deputies, the officials governing the town or city, or the justices of the peace and constables thereof, or any of them, must go among the persons assembled, or as near to them as possible, and command them, in the name of the people of the state, immediately to disperse. If the persons assembled do not immediately disperse, such magistrate and officers must arrest them, and to that end may command the aid of all persons present or within the county. When there is an unlawful or riotous assembly with the intent to commit a felony, or to offer violence to person or property, or to resist by force the laws of the state, or of the United States, and the fact is made known to the governor, or to any justice of the supreme court, or to the superior judge or sheriff of the county, or to the mayor of a city, or to the president of the board of supervisors of the cities and counties of Sacramento and San Francisco, either of those officers may issue an order directed to the commanding officer of a division or brigade of the organized national guard or enrolled militia of the state, to order his command, or such part thereof as may be necessary, into active service, and to appear at a time and place therein specified to aid the civil authorities in suppressing violence and enforcing the laws,"—and such armed force must obey the orders of such civil officer in relation thereto. "If in the opinion of such civil officer it shall become necessary that the troops shall fire or charge upon any mob or body of persons so assembled, such civil officer shall give a written order to that effect to the superior officer present in command of such troops, who will at once proceed to carry out the order, and shall direct the firing and

attack to cease only when such unlawful assembly shall have been dispersed, or when ordered to do so by the proper civil authority. When the governor is satisfied that the execution of civil or criminal process has been forcibly resisted in any county by bodies of men, or that combinations to resist the execution of process by force exist in any county, and that the power of the county has been exerted and has not been sufficient to enable the officers having the process to execute it, he may, on the application of the officer, or of the district attorney or county judge of the county, by proclamation published in such papers as he may direct, declare the county to be in a state of insurrection, and may order into the service of the state such number and description of the organized national guard or volunteer uniformed companies, or other militia of the state, as he deems necessary, to serve for such term and under the command of such officer as he may direct." Any person who, after the publication of such proclamation, resists or aids in resisting the execution of process in any county declared to be in a state of insurrection, or who aids or attempts the rescue or escape of another from lawful custody or confinement, or who resists or aids in resisting any force ordered out by the governor to quell or suppress an insurrection, is punishable by imprisonment in the state prison not less than two years. (*California. Pen. Code, secs. 411, 726-732.*)

§ 43. **Remaining at place of riot after warning.**
"Every person remaining present at the place of any riot, rout, or unlawful assembly, after the same has been lawfully warned to disperse, except public offi-

cers and persons assisting them in attempting to disperse the same, is guilty of a misdemeanor." (*California. Pen. Code, sec. 409.*)

§ 44. **Neglect to disperse rioters.** "If a magistrate or officer, having notice of an unlawful or riotous assembly, mentioned in this chapter, neglects to proceed to the place of assembly, or as near thereto as he can with safety, and to exercise the authority with which he is invested for suppressing the same and arresting the offenders, he is guilty of a misdemeanor." (*California. Pen. Code, sec. 410.*)

§ 45. **Prosecution of gamblers.** "Every sheriff, district attorney, constable, or police officer must inform against and diligently prosecute persons whom they have reasonable cause to believe offenders against the provisions of the Penal Code relative to gambling; and every such officer refusing or neglecting so to do, is guilty of a misdemeanor." (*California. Pen. Code, sec. 335.*)

§ 46. **Officer must not act as attorney.** Sheriffs and their deputies are prohibited from practicing law, or acting as attorneys or counselors at law, in the counties where they reside and hold office, or from having as a partner a lawyer, or any one who acts as such. (*California. County Govt. Bill, sec. 68; Stats. 1893, p. 368; Pol. Code, sec. 4121.*) Nor is it lawful for the sheriff or any of his deputies of the city and county of San Francisco to appear or advocate, or in any manner act as attorney, counsel, or agent for any party or person in any cause, or in relation to any demand, account, or claim pending,

or to be sued or prosecuted before the justices of the peace of that city and county, or any of them, or which may be within their jurisdiction; and a violation of this provision shall be deemed a misdemeanor in office.

§ 47. **May administer oaths.** The sheriff and his deputies may administer and certify oaths. (*California. County Govt. Bill, sec. 65; Pol. Code, sec. 4118.*) As this statutory power is conferred without restriction, the exercise of the power would seem to be not limited to matters otherwise coming within the line of his official business. (*Pfeiffer v. Riehn, 13 Cal. 648.*)

§ 48. **Payment of moneys to treasurer.** The sheriff must pay into the county treasury, on the first Monday in each month, the fees allowed by law in all cases, except such fees as are a charge against the county, and must accompany the same by a statement of the aggregate amount thereof, as shown by the fee book, duly verified by the officer by his affidavit in the form prescribed by law. (*California. County Govt. Bill, secs. 217, 219; Stats. 1893, pp. 508, 509.*)

§ 49. **Sheriff to give dead bodies to physicians.** "The sheriff or keeper of a county jail must surrender the dead bodies of such persons as are required to be buried at the public expense to any physician or surgeon, to be by him used for the advancement of anatomical science, preference being always given to medical schools by law established in this state, for their use to the instruction of medical students.

But if such person during his last sickness requested to be buried, or if, within twenty-four hours after his death, some person claiming to be of kindred or a friend of the deceased requires the body to be buried, or if such deceased person was a stranger or traveler who suddenly died before making himself known, such dead body must be buried without dissection." (*California. Pol. Code, sec. 3094; Stats. 1907, p. 835.*)

§ 50. **Food and lodging for juries.** While a jury are kept together, either during the progress of the trial or after their retirement, for deliberation, they must be provided by the sheriff, at the expense of the county, with suitable and sufficient food and lodging. (*California. Pen. Code, sec. 1136.*)

§ 51. **Embezzlement and falsification of accounts.** "Every officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safe keeping, transfer, or disbursement of public moneys, who either:

"1. Without authority of law appropriates the same or any portion thereof to his own use, or to the use of another; or,

"2. Loans the same or any portion thereof; or,

"3. Fails to keep the same in his possession until disbursed or paid out by authority of law; or,

"4. Unlawfully deposits the same or any portion thereof in any bank, or with any banker or other person; or,

"5. Changes or converts any portion thereof from coin into currency or from currency into coin or other currency, without authority of law; or,

"6. Knowingly keeps any false account, or makes any false entry or erasure in any account of or relating to the same; or,

"7. Fraudulently alters, falsifies, conceals, destroys, or obliterates any such account; or,

"8. Willfully refuses or omits to pay over, on demand, any public moneys in his hands, upon the presentation of a draft, order, or warrant drawn upon such moneys by competent authority; or,

"9. Willfully omits to transfer the same, when such transfer is required by law; or,

"10. Willfully omits or refuses to pay over to any officer or person authorized by law to receive the same, any money received by him under any duty imposed by law so to pay over the same:

—Is punishable by imprisonment in the state prison for not less than one nor more than ten years, and is disqualified from holding any office in this state." (*California. Pen. Code, sec. 424.*)

§ 52. **Larceny, mutilation, or destruction of records.** "Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of stealing, willfully destroying, mutilating, defacing, altering or falsifying, removing or secreting the whole or any part of such record, map, book, paper, or proceeding, or who permits any other person so to do, is punishable by imprisonment in the state prison not less than one nor more than fourteen years." (*California. Pen. Code, sec. 113.*)

§ 53. **Breach or omission of duty.** For every failure or refusal to perform official duty when the fees are tendered, he the sheriff is liable on his official bond. (*California. County Govt. Bill, sec. 223; Stats. 1893, p. 510.*) "Every willful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision shall have been made for the punishment of such delinquency, is punishable as a misdemeanor." (*California. Pen. Code, sec. 176.*) In *Ex parte Harrold*, 47 Cal. 129, it is declared that this provision does not apply to conditions or qualifications on which the incumbent's right to hold an office depends, but to duties pertaining to the office, while in the discharge of official duties.

§ 54. **False certificates.** "Every public officer authorized by law to make or give any certificate or other writing, who makes and delivers as true any such certificate or writing, containing statements which he knows to be false, is guilty of a misdemeanor." (*California. Pen. Code, sec. 167.*)

§ 55. **Assaults by officers.** "Every public officer who, under color of authority, without lawful necessity, assaults or beats any person, is punishable by fine not exceeding five thousand dollars, and imprisonment in the county jail not exceeding five years." (*California. Pen. Code, sec. 149.*)

§ 56. **Sheriff's badges.** The boards of supervisors of the several counties of this state must furnish to the sheriff, under sheriffs, and deputy sheriffs

of their respective counties, a suitable badge of office, upon which shall be inscribed the words "sheriff" and "deputy sheriff." (*California. Stats.* 1875-1876, *p.* 803.)

§ 57. **Appointment of under sheriff.** In California "the board of supervisors may allow the sheriff an under sheriff, at a salary to be fixed by the board, not to exceed two hundred dollars per month," in counties of the second class. (*California. County Govt. Bill, sec.* 164, *subd.* 17; *Stats.* 1893, *p.* 393.)

§ 58. **Direction to sheriff must be in writing.** "No direction or authority by a party or his attorney to a sheriff, in respect to the execution of process or return thereof, or to any act or omission relating thereto, is available to discharge or excuse the sheriff from a liability for neglect or misconduct, unless it is contained in a writing, signed by the attorney of the party, or by the party, if he has no attorney." (*California. County Govt. Bill, sec.* 102; *Stats.* 1893, *p.* 373; *Pol. Code, sec.* 4185.)

§ 59. **When sheriff justified in executing process.** "A sheriff, or other ministerial officer, is justified in the execution of and must execute all process and orders regular on their face and issued by competent authority, whatever may be the defect in the proceedings upon which they were issued." (*California. County Govt. Bill, sec.* 104; *Stats.* 1893, *p.* 373; *Pol. Code, sec.* 4187.)

§ 60. **Officer to exhibit process.** "The officer executing process must then, and at all times sub-

sequent, so long as he retains it, upon request show the same, with all papers attached, to any person interested therein." (*California. County Govt. Bill, sec. 105; Stats. 1893, p. 373; Pol. Code, sec. 4188.*)

§ 61. **Service on sheriff, how made.** "Service of a paper, other than process, upon the sheriff may be made by delivering it to him or to one of his deputies, or to a person in charge of the office during office hours, or if no such person is there, by leaving it in a conspicuous place in the office." (*California. County Govt. Bill, sec. 107; Stats. 1893, p. 373; Pol. Code, sec. 4190.*)

§ 62. **Return of process from another county.** "When process or notices are returnable to another county, he [the sheriff] may inclose such process or notice in an envelope, addressed to the officer from whom the same emanated, and deposit it in the post-office, prepaying postage." (*California. County Govt. Bill, sec. 94; Stats. 1893, p. 372; Pol. Code, sec. 4177.*)

§ 63. **Return prima facie evidence.** "The return of the sheriff upon process or notices is *prima facie* evidence of the facts in such return stated." (*California. County Govt. Bill, sec. 95; Stats. 1893, p. 372; Pol. Code, sec. 4178.*)

§ 64. **Penalty for non-return of process, etc.** "If the sheriff does not return a notice or process in his possession with the necessary indorsement thereon without delay, he is liable to the party aggrieved for the sum of two hundred dollars and for all damages

sustained by him." (*California. County Govt. Bill, sec. 96; Stats. 1893, p. 372; Pol. Code, sec. 4179.*)

§ 65. **Liable for refusing to levy.** "If the sheriff to whom a writ of execution is delivered neglects or refuses, after being required by the creditor or his attorney, to levy upon or sell any property of the party charged in the writ which is liable to be levied upon and sold, he is liable to the creditor for the value of such property." (*California. County Govt. Bill, sec. 97; Stats. 1893, p. 372; Pol. Code, sec. 4180.*)

§ 66. **Neglect or refusal of sheriff to pay over moneys.** "If he neglects or refuses to pay over on demand, to the person entitled thereto, any money which may come into his hands by virtue of his office (after deducting his legal fees), the amount thereof, with twenty-five per cent damages and interest at the rate of ten per cent per month from the time of demand, may be recovered by such person." (*California. County Govt. Bill, sec. 98; Stats. 1893, p. 372; Pol. Code, sec. 4181.*)

"If any clerk, justice of the peace, sheriff, or constable, who receives any fine or forfeiture, refuses or neglects to pay over the same according to law and within thirty days after the receipt thereof, he is guilty of a misdemeanor." (*California. Pen. Code, sec. 427.*)

"Every officer charged with the receipt, safe keeping, or disbursement of public moneys, who neglects or fails to keep and pay over the same in the manner prescribed by law, is guilty of felony." (*California. Pen. Code, sec. 425. See, also, sec. 51, ante.*)

§ 67. **Service of writs by telegraph.** In California and some other states provision is made by statute for the transmission of writs by telegraph for service, in which case the service and return are made in the same manner as if the original were to be served.

§ 68. **Coroner to execute process when sheriff a party.** "When the sheriff is a party to an action or proceeding, the process and orders therein, which it would otherwise be the duty of the sheriff to execute, must be executed by the coroner of the county; *provided*, when any action is begun against the sheriff, all process and order may be served by any person, a citizen of the United States, over the age of eighteen years, in the manner provided in the Code of Civil Procedure." (*California. County Govt. Bill, sec. 108; Stats. 1893, p. 374.*)

§ 69. **Elisors to act in cases designated.** "Process and orders in an action or proceeding may be executed by a person residing in the county, designated by the court, the judge thereof, or a county judge, and denominated an elisor, in the following cases:—

"1. When the sheriff and coroner are both parties;

"2. When either of these officers is a party and the process is against the other; and,

"3. When either of these officers is a party and there is a vacancy in the office of the other, or when it appears by affidavit to the satisfaction of the court in which the proceeding is pending, or to the judge thereof, that both of these officers are disqualified, or by reason of any bias, prejudice, or other cause, would not act promptly or impartially.

“When process is delivered to an elisor, he must execute and return it in the same manner as the sheriff is required to execute similar process.” (*California. County Govt. Bill, sec. 109; Stats. 1893, p. 374; Pol. Code, sec. 4192.*)

§ 70. **Fees of coroner or elisor.** “Whenever process is executed, or any act performed by a coroner or elisor in the cases provided by law in that behalf, such coroner or elisor shall be entitled to receive the same fees as the sheriff would be entitled to receive for the same service, to be paid by the plaintiff in case of the summoning of jurors to complete the panel, and by the person or party requiring the service in all other cases in private actions. If rendered at the instance of the people, it shall be audited and paid as a county charge.” (*California. County Govt. Bill, sec. 109; Stats. 1893, p. 374.*)

§ 71. **Vacancies.** Strictly speaking, there can be no vacancy in the office of sheriff, caused by the death, removal, or resignation of the incumbent, for upon the happening of such an event, the coroner, by operation of law, becomes sheriff, in the absence of statutory provision to the contrary. (*People v. Phœnix, 6 Cal. 92.*) But the coroner only holds the office of sheriff *ex officio* until the appointment of a new sheriff, by the board of supervisors. (*California. See sec. 77 post.*)

§ 72. **When vacancy exists — Generally.** “The office of sheriff becomes vacant on the happening of either of the following events before the expiration of the term:—

- "1. The death of the incumbent.
- "2. His insanity, found upon a commission of lunacy issued to determine the fact.
- "3. His resignation.
- "4. His removal from office.
- "5. His ceasing to be an inhabitant of the . . . county. . . .
- "6. His absence from the state . . . beyond the period allowed by law.
- "7. His ceasing to discharge the duties of his office for the period of three consecutive months, except when prevented by sickness.
- "8. His conviction of a felony, or of any offense involving a violation of his official duties.
- "9. His refusal or neglect to file his official oath or bond within the time prescribed.
- "10. The decision of a competent tribunal declaring void his election or appointment." (*California. Pol. Code, sec. 996; County Govt. Bill, sec. 67.*)

§ 73. **Resignation—To whom sent.** The resignation of the sheriff must be in writing and filed with the clerk of the board of supervisors. (*California. Pol. Code, sec. 995.*)

§ 74. **Removal from office by summary proceedings.** "When an information in writing, verified by the oath of any person, is presented to a superior court, alleging that any officer within the jurisdiction of the court has been guilty of charging and collecting illegal fees for services rendered or to be rendered in his office, or has refused or neglected to perform the official duties pertaining to his office, the court must cite the party charged to appear be-

fore the court at a time not more than ten nor less than five days from the time the information was presented, and on that day or some other subsequent day, not more than twenty days from that on which the information was presented, must proceed to hear, in a summary manner, the information and evidence offered in support of the same, and the answer and evidence offered by the party informed against; and if on such hearing it appears that the charge is sustained, the court must enter a decree that the party informed against be deprived of his office, and must enter a judgment for five hundred dollars in favor of the informer, and such costs as are allowed in civil cases." (*California. Pen. Code, sec. 772.*)

In addition to the penalty affixed by express terms, to every neglect or violation of official duty on the part of public officers—state, county, city, or township—where it is not so expressly provided, they may, in the discretion of the court, be removed from office. (*California. Pen. Code, sec. 661. See, also, next section.*)

§ 75. **Accusation by grand jury.** "An accusation in writing against any district, county, township, or municipal officer, for willful or corrupt misconduct in office, may be presented by the grand jury of the county for or in which the officer accused is elected or appointed." (*California. Pen. Code, sec. 758.*)

§ 76. **Absence from state.** The sheriff shall in no case absent himself from the state for a period of more than sixty days, and for no period without the consent of the board of supervisors of the county."

(*California. County Govt. Bill, sec. 67; Stats. 1893, p. 367; Pol. Code, sec. 4120.*)

§ 77. **Conviction of certain offenses.** When the sheriff is committed under an execution or commitment for not paying over money received by him by virtue of his office, and remains committed for sixty days, his office is vacant. (*California. Stats. 1893, p. 373, sec. 103; Pol. Code, sec. 4186.*)

The board of supervisors, upon receiving a certified copy of the record of conviction of any officer for receiving illegal fees, must declare his office vacant. (*California. Stats. 1893, p. 510. See, also, sec. 72, ante.*)

§ 78. **Withdrawal of sureties.** After the withdrawal of any of the sureties on the sheriff's official bond, in the manner prescribed in sections 972 to 974 of the Political Code, the superior judge or judges must make an order declaring the office vacant. (*California. Pol. Code, sec. 975.*)

§ 79. **How vacancy is filled.** A vacancy in the office is filled by appointment made by the board of supervisors. Appointees hold until the vacancies are filled by election. (*California. Pol. Code, sec. 4115.*)

§ 80. **Not to be interested in certain contracts.** The sheriff must not be interested in any contract made by him in his official capacity, such as contracts for sheriff's advertising and the like. (*California. Pen. Code, sec. 920.*)

§ 81. **Not to purchase at certain sales.** The sheriff must not be a purchaser at any sale nor vendor at any purchase made by him in his official capacity. (*California. Pen. Code, sec. 71.*)

§ 82. **Not to deal in scrip, etc.** The sheriff and his deputies are "prohibited from purchasing or selling, or in any manner receiving to their own use or benefit, or to the use or benefit of any person or persons whatever, any state, county, or city warrants, scrip, orders, demands, claims, or other evidences of indebtedness against the state, or any county or city thereof, except evidences of indebtedness issued to or held by them for services rendered as such officer, deputy, or clerk, and evidences of the funded indebtedness of such state, city, town, or corporation." (*California. Pol. Code, sec. 923.*)

§ 83. **Penalty for violation.** Any person violating any of the provisions of the three preceding sections "is punishable by a fine of not more than one thousand dollars, or by imprisonment in the state prison not more than five years, and is forever disqualified from holding any office in this state." (*California. Pen. Code, sec. 71.*)

§ 84. **Expiration of term—Execution of Process.** "When any process remains with the sheriff unexecuted, in whole or in part, at the time of his death, resignation of office, or at the expiration of his term of office, said process shall be executed by his successor or successors in office, and when the sheriff sells real estate, under and by virtue of an execution or order of court, he or his successors in office shall

execute and deliver to the purchaser or purchasers all such deeds and conveyances as are required by law and necessary for the purpose, and such deeds and conveyances shall be as valid in law as if they had been executed by the sheriff who made the sale.” (*California. Stats.* 1893, *pp.* 373, 374, *sec.* 107.)

§ 85. **Unfinished business—Compensation of successor.** It is the duty of the sheriff to complete the business of his office to the time of the expiration of his term; and in case he shall leave to his successor official labor to be performed which it was his duty to perform, he shall be liable to pay to his successor the full value for such services. (*California. Stats.* 1893, *p.* 511, *sec.* 227.)

§ 86. **To surrender books, etc., to successor.** “Every officer whose office is abolished by law, or who, after the expiration of the time for which he may be appointed or elected, or after he has resigned or been legally removed from office, willfully and unlawfully withholds or detains from his successor, or other person entitled thereto, the records, papers, documents, or other writing appertaining or belonging to his office, or mutilates, destroys, or takes away the same, is punishable by imprisonment in the state prison not less than one nor more than ten years.” (*California. Pen. Code, sec.* 76.)

§ 87. **Resisting public officer.** “Every person who willfully resists, delays, or obstructs any public officer in the discharge or attempt to discharge any duty of his office, when no other punishment is prescribed, is punishable by fine not exceeding five

thousand dollars, and imprisonment in the county jail not exceeding five years." (*California. Pen. Code, sec. 148.*)

"Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by fine not exceeding five thousand dollars, and imprisonment in the county jail not exceeding five years." (*California. Pen. Code, sec. 69.*)

§ 88. Justifiable homicide by public officers.

"Homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance, either—

"1. In obedience to any judgment of a competent court; or,

"2. When necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or,

"3. When necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest." (*California. Pen. Code, sec. 196.*)

The law governing the taking of human life by officers of justice is thus stated by Carlton on Homicide (*sec. 528*): "In cases of felony, the killing is justifiable before an actual arrest is made where in no other way the escaping felon can be taken. In such cases,—that is to say, in cases of felony,—if the

felon flees from justice, or if a dangerous wound be given, it is the duty of every man to use his best endeavors for preventing an escape; and if, in the pursuit, the felon be killed, when he cannot otherwise be taken, the homicide is justifiable; and the same rule holds if the felon, after being legally arrested, break away and escape. But, if he may be taken in any case without such severity, it is at least manslaughter in him who kills him; and the jury ought to inquire whether it was done of necessity or not." In *State v. Bland*, 97 N. C. 438, 2 S. E. 460, the court say: "The law does not clothe an officer with the authority to judge arbitrarily of the necessity of killing a prisoner to secure him, or of killing a person to prevent a rescue of a prisoner. He cannot kill unless there is a necessity for it, and the jury must determine from the testimony the existence or absence of the necessity." The rule deducible from the authorities is that a sheriff or other officer, in arresting or preventing the escape of a person charged with a felony, may use such force as is reasonably necessary, even to the taking of life. But if the felon can be taken, or his escape prevented, without killing the offender, and he be slain, the officer is guilty of, at least, manslaughter.

§ 89. **Retaking goods from officer.** "Every person who willfully injures or destroys, or takes or attempts to take, or assists any person in taking or attempting to take, from the custody of any officer or person, any personal property which such officer or person has in charge under any process of law, is guilty of a misdemeanor." (*California. Pen. Code, sec. 102.*)

§ 90. **Giving or offering bribes to officer.** . "Every person who gives or offers any bribe to any executive officer of this state, with intent to influence him in respect to any act, decision, vote, opinion, or other proceeding as such officer, is punishable by imprisonment in the state prison not less than one nor more than fourteen years, and is disqualified from holding any office in this state. (*California. Pen. Code, sec. 67.*)

§ 91. **Fish nets—Confiscation unauthorized.** So much of section 636 of the Penal Code of California as declares that all nets, etc., used in catching or taking fish in violation of chapter I of title XV of said code, shall be forfeited, and may be seized by the peace officers of the county, and by them destroyed or sold, is unconstitutional and void. (*Ieck v. Anderson, 57 Cal. 251, 40 Am. Rep. 115.*) Confiscations without a judicial hearing and judgment, after due notice, are void, as not being due process of law.

§ 92. **Computing time.** "The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded." (*California. Pol. Code, sec. 12.*)

§ 93. **When act falls on holiday.** "Whenever any act of a secular nature other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next business day with the same effect as

if it had been performed upon the day appointed.”
(*California. Pol. Code, sec. 13.*)

§ 94. **Legal holidays.** In California the following are legal holidays: Every Sunday, January 1st, February 22d, May 30th, July 4th, September 9th, the first Monday in September, December 25th, every day on which an election is held throughout the state, and every day appointed by the President of the United States, or by the governor of this state, for a public fast, thanksgiving, or holiday. If the first day of January, the 22d of February, the 30th of May, the 4th of July, the 9th of September, or the 25th of December, fall upon a Sunday, the Monday following is a holiday.

Every Saturday from twelve o'clock noon until twelve o'clock midnight is a holiday as regards the transaction of business in the public offices of this state, and also in political divisions thereof where laws, ordinances, or charters provide that public offices may be closed on holidays; *provided*, this shall not be construed to prevent or invalidate the issuance, filing, service, execution, or recording of any legal process or written instrument whatever on such Saturday afternoons. (*Stats. 1907, p. 565.*)

CHAPTER III.

CONSTABLES.

- § 95. Nature of the office.
- § 96. Duties of the office.
- § 97. Appointment of deputies.
- § 98. Law governing acts of constables.
- § 99. Arrest outside of county—Fees.

§ 95. **Nature of the office.** The constable is the executive officer of the justices' courts in his township, and usually has by statute the same powers and duties as to the court and its process as the sheriff has with reference to the courts of record of the county. (*California. Pol. Code, secs. 4104, 4314-4315.*)

§ 96. **Duties of the office.** "Constables must attend the courts of justices of the peace within their townships whenever so required, and within their counties execute, serve, and return all writs, processes, and notices directed or delivered to them by a justice of the peace of such county or by any competent authority." They also have the same general duties as the sheriff, excepting as to the custody of the county jail and attendance upon courts of record, as mentioned in section 22 *ante*. Express statutory provision is also usually made, giving the constable the same powers as the sheriff in cases of attachment, replevin, and the like, in the justices' courts. (*California. Pol. Code, secs. 4314, 4315; Stats. 1907, p. 406; Code Civ. Proc., secs. 869, 870.*)

§ 97. **Appointment of deputies.** A constable may appoint as many deputies as may be necessary for the prompt and faithful discharge of the duties of his office. Such appointment must be made in writing and filed in the office of the county clerk; and until such appointment is made and filed, and until such deputy shall have taken the oath of office, no one shall be or act as such deputy. (*California County Govt. Bill, sec. 61; Stats. 1893, p. 367.*)

§ 98. **Law governing acts of constables.** As the duties and powers of constables as to process issuing from justices' courts are the same as those of the sheriff with reference to process from the courts of record, the same rules of procedure and court decisions are applicable. Such provisions and decisions are to be found in the several chapters of this work devoted to the respective subjects.

§ 99. **Arrest outside of county—Fees.** In California a constable may go outside of his county to execute criminal process, provided the same be properly indorsed as provided by the statute; and the constable who makes such arrest is entitled to his fees for traveling both ways. (*Allen v. Napa County, 82 Cal. 187, 23 Pac. 43.*)

CHAPTER IV.

SUMMONS.

- § 100. Office and issuance of summons.
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- § 130. Correction of return.
- § 131. Amended summons—service of.
- § 132. Criminal summons against corporation.

§ 133. Summons in justices' courts.

§ 134. Summons in justices' courts—Service outside the county.

§ 135. Unauthorized service set aside.

§ 100. **Office and issuance of summons.** The office of a summons is to give the defendant authentic notice that an action has been commenced against him, to apprise him of the nature and amount of the claim of the plaintiff, and to compel his appearance in court to answer to these demands within a time stated, under penalty of forfeiting all subsequent right to dispute their validity or to prevent their enforcement. (1 *Wait's Practice*, p. 468.)

Summons out of a court of record is issued under the seal of the court and signature of the clerk.

§ 101. **Prompt service due to plaintiff.** The service of the summons—and, in fact, of any process—should not be unnecessarily delayed. The plaintiff is in pursuit of his rights, and he may reasonably expect prompt assistance in that pursuit, from the officers upon whom he must rely. Delay in the service of even so simple a process may subject him to irreparable loss. He is entitled by right to every facility which the law allows him to a speedy hearing of his cause before the court.

§ 102. **The receipt.** The original summons should be indorsed as soon as received, with the month, day, year, hour, and minute of its reception; and, when required by law, copies for service prepared, and compared with the original, to insure correctness, and a copy of the complaint attached to

each copy of the summons. (*California. Code Civ. Proc., sec. 410; Pen. Code, sec. 4176.*)

§ 103. **The complaint.** A copy of the complaint for service is usually furnished to the officer with the original summons, when required for service. If not so furnished and the officer prepares the copy by request of the plaintiff, he may charge his lawful fees for making such copy. If the case is brought in a justice's court, in most states the complaint may be either a concise statement in writing of the facts constituting the plaintiff's cause of action or a copy of the account, note, bill, bond, or instrument upon which the action is based. (*California. Code Civ. Proc., sec. 853.*)

§ 104. **By whom served.** The code and statutory provisions vary much in different states as to the service of summons. In California service may be made by the sheriff or by any other person of the age of eighteen years or over, not a party to the action.

§ 105. **How served, generally.** Service of summons is made by delivering to each of the defendants personally a copy of the summons and a copy of the complaint.

§ 106. **Corporations, minors, and insane persons.** The summons is served by delivering a copy thereof (and of the complaint), as follows:

"1. If the suit is against a corporation formed under the laws of this state: to the president or other head of the corporation, secretary, cashier, or managing agent thereof.

"2. If the suit is against a foreign corporation, or a non-resident joint stock company or association, doing business and having a managing or business agent, cashier, or secretary within this state: to such agent, cashier, or secretary.

"3. If against a minor, under the age of fourteen years, residing within this state: to such minor, personally, and also to his father, mother, or guardian; or if there be none within this state, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed.

"4. If against a person residing within this state who has been judicially declared to be of unsound mind, or incapable of conducting his own affairs, and for whom a guardian has been appointed: to such person and also to his guardian.

"5. If against a county, city, or town: to the president of the board of supervisors, president of the council, or trustees, or other head of the legislative department thereof." (*California. Code Civ. Proc., sec. 411.*)

§ 107. **Service on corporations—Decisions.** The manner of service upon corporations, insane persons, counties, cities, and towns in California is prescribed in section 411 of the Code of Civil Procedure. (*Sec. 104, ante.*)

In an action against a corporation, where the summons was served upon Bristol, who had been duly elected its president, and presided at several meetings of its board of trustees, and who had never resigned, or been removed, or his office declared vacant, or a permanent president chosen in his place, though he had left the county and no longer took any part in the

management of the corporation affairs, and at the meeting of the board after his so leaving the county, another person was elected president *pro tempore*, for that meeting, and was regarded by the stockholders as the president; *held*, that Bristol was still president *de jure*, and the service upon the corporation valid. (*Eel River N. Co. v. Struver*, 41 Cal. 618.)

In *Rowe v. Table Mountain W. Co.*, 10 Cal. 444, a question was raised as to the regularity of a judgment by default, on a service of the summons upon one M. as president, and C. as secretary, without proof beyond the mere return that those persons were such officers. The court held that as the statute expressly authorized a service upon the corporation by serving the summons on their officers, and as the practice had been to take judgment by default upon similar returns, they would not hold it erroneous.

§ 108. **Service upon foreign corporations.** When foreign corporations are required to file with the secretary of state an instrument designating a person upon whom process might be served, service of summons upon such person is sufficient, so long as such designation is not revoked, and although such person is not one of the officers of the corporation mentioned in the code section prescribing the persons upon whom service of summons against a corporation may be made generally. (*Eureka Lake and Y. C. Co. v. Superior Court*, 66 Cal. 311, 5 Pac. 490.)

When the statute provides for service of summons upon the "managing agent or cashier" of a foreign corporation, service upon a person employed as clerk in a store belonging to it is not sufficient, although he has the custody of moneys of the corporation,

keeps accounts of employees and pays them. (*Blanc v. Paymaster Mining Co.*, 95 *Cal.* 524, 29 *Am. St. Rep.* 149, 30 *Pac.* 765.)

§ 109. **Service on minors.** Under the California code provision for service of summons upon minors (*sec. 104 ante*), not only should a copy of the summons and complaint be delivered to each minor, but a copy for each minor should be delivered to the father, mother, or guardian, or the person having the care or control of such minors, or with whom they reside, or in whose service they are employed.

If a father sues his infant son residing with him, and the statute requires the summons to be served personally on the infant and also on the father, a service on the infant alone is sufficient, for the father has notice of the suit without service. (*Brown v. Lawson*, 51 *Cal.* 615.)

§ 110. **Service on partnership.** "When two or more persons, associated in any business, transact such business under a common name, whether it comprise the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates, and the judgment in the action shall bind the joint property of all the associates, in the same manner as if all had been named defendants, and had been sued upon their joint liability." (*California. Code Civ. Proc.*, *sec. 388.*)

§ 111. **In actions against vessels.** In an action against a steamer, vessel, or boat, "the summons and copy of the complaint must be served on the owners

if they can be found, otherwise they may be served on the master, mate, or person having charge of the steamer, vessel or boat." (*California. Code Civ. Proc., sec. 816.*)

§ 112. **Service of summons in forcible and unlawful detainer.** The summons must be directed to the defendant, and be served at least two days before the return day designated therein, and must be served and returned in the same manner as summons in civil actions is served and returned. (*California. Code Civ. Proc., sec. 1167.*)

§ 113. **Service to be personal.** Unless the statute provides otherwise, as in Colorado, Montana, Oregon, and Washington (*sec. 103 ante*), the copy of summons must be delivered to the defendant personally. It is no service on a defendant to deliver it to any relative of the defendant for him. In case of defendants other than natural persons of sound mind and over the age of majority, care must be taken that the service be made strictly according to the requirements of the statute.

The law is explicit in this regard, and wisely so; for, if it were otherwise, advantage might be taken in many ways by evil-disposed persons to defraud defendants of their rights. A court acquires no jurisdiction over a defendant who has not been legally brought into court.

§ 114. **Long delay in service of summons.** If the plaintiff fails to prosecute his suit with reasonable diligence the suit may be dismissed on motion of the defendant. The question of whether the delay

in prosecution by failure to serve the summons is reasonable, is one for the consideration of the court under all the circumstances of each particular case. In California, since 1889, an action may be dismissed if the summons is not served and returned within three years after the commencement of the action. (*Code Civ. Proc.*, sec. 581.) Under this provision, however, the court still has discretionary power to dismiss for inexcusable delay before the expiration of that period. (*Kreiss v. Hotaling*, 99 Cal. 383, 33 Pac. 1125.)

§ 115. **Inexcusable delay—Instances.** If a summons is not served until three years after the complaint is filed and it is issued, and there is no reasonable excuse for the delay, the service will be set aside, on motion, and the suit dismissed. (*Eldridge v. Kay*, 45 Cal. 49.) In this case the defendants during all the time were living within a short distance of the plaintiff, and were easy to be found. The court held that such delay was absolutely without excuse, and that it would be a practical defeat of the statute, which limits the issuance of a summons to the period of one year after the filing of the complaint.

Where a complaint was filed and summons issued more than eight years before service, a motion to set aside the summons and strike the complaint from the files was properly granted. (*Dupuy v. Shear*, 29 Cal. 238.)

Allowing an action to rest without service of summons, for two years and eight months after the summons is issued, is such a want of diligence as to justify the court in dismissing the action. (*Grigsby v. Napa Co.*, 36 Cal. 585, 95 Am. Dec. 213.)

§ 116. **Refusing service.** Serious annoyances sometimes occur from incomplete service of summons and from imperfect returns of service. Defendants often attempt to avoid service, and when found and the summons is tendered to them, refuse to take it.

It is a sufficient service in such a case to lay the summons upon the defendant's arm or shoulder, or reach it toward him and let go of it, leaving it to the defendant to take or let it alone. It does not lie in the mouth of a person to say he was not served with process when it is offered to him and he refuses to take it.

§ 117. **Fraudulent service.** A trick depriving a defendant of fair notice that an action has been commenced is a fraud. Thus, if one departing for a foreign country, when on the steamer, which is about to start, is handed a sealed package containing the summons, and he has no reasonable opportunity to discover its contents before leaving, the service is not good. (*Bulkley v. Bulkley*, 6 *Abb. Prac.* 307.)

Service of summons to be effective must have been intended as such, and the defendant must know that service was intended. (*Heatherly v. Hadley*, 2 *Or.* 276; *Beckman v. Cutter*, 2 *Code Rep.* 51; *Niles v. Vandezee*, 14 *How. Prac.* 547; *Davison v. Baker*, 24 *How. Prac.* 39.)

There are numerous authorities declaring that where a defendant is brought into the territorial jurisdiction of the court by force, or induced to come within the jurisdiction by deceitful or fraudulent practices, for the purpose of having him served with process therein, such service is not good, and will not confer jurisdiction, but will be set aside.

Service of summons upon a man who is so drunk that he cannot comprehend may be considered in its nature fraudulent, and set aside. (*Murphy v. Loos*, 104 Ill. 514.) So service by laying a summons on the body of a man too sick to understand it, is not valid. (*People v. Superior Judge*, 38 Mich. 310.)

§ 118. **Return—When and to whom made.** The summons should be returned as soon as all the defendants have been served. It may not be necessary for any purpose that it should be returned on the same day, but the clerk's office is the proper place for all process after service and where all the parties interested have reason to look for it, in the absence of any statute to the contrary. If the officer is instructed to serve only a portion of the defendants, and there are others to serve elsewhere, the summons should be delivered to the plaintiff or his attorney, to enable him to secure service on the others.

In California no time is fixed for the return of summons, except in forcible and unlawful detainer cases (*Code Civ. Proc.*, sec. 1167), but when it is served by the sheriff, it must be returned, with his certificate of service, to the office of the clerk from which it issued. In all cases the service should be made promptly and return be made without delay; and such is the statutory requirement in some states. Unless otherwise required by statute, as in Colorado, where the summons may be returned "to the attorney who issued the same," the return should be made to the clerk of the court. (*California. Code Civ. Proc.*, sec. 410; *Pol. Code*, sec. 4176.)

§ 119. **Form of return.** The return of the officer should be in the form of a certificate showing the name of the person served, together with the date of service, county and state where served, and that a copy of the complaint was also served, when such service is necessary. If any of the persons cannot be found, upon whom service is required to be made, the certificate should show that the sheriff has made diligent search within his county but is unable to find the person, naming or otherwise properly designating him, or stating the appropriate facts. The return should show clearly that those acts have been done which the statute requires in making service. If the service is required to be made by a person of a certain age, the return should show that the person was of that age at the time of making the service. (*See Sheriff's and Constables' Forms, chap. XXXII post.*)

In case of service upon minors, the return should be sufficiently explicit to show, for instance, in California, that not only a copy of the summons had been delivered to each minor, but that in addition thereto a copy was delivered to the father, or mother, or guardian, etc., for each minor. There are no means of avoiding the provision of the code which requires service of summons upon infant defendants. The court acquires jurisdiction of the persons of infant defendants, so as to authorize the appointment of a guardian *ad litem* for them, only by service of summons upon the infants. The same rule of strictness applies in the case of the service of corporations and persons of unsound mind. (*See secs. 106, 107 ante.*)

In making service of a summons, and in the return of such service, the provisions of the statute must be,

and must be shown to have been, substantially observed and followed by the officer, otherwise the proceedings cannot be supported upon a direct appeal taken. (*People v. Bernal*, 43 Cal. 385. *California. Code Civ. Proc.*, sec. 415.)

§ 120. **True name to be given.** The return of the officer should show the true name of the defendant served; and, to ascertain the true name, he should ask the party served if the name designated in the summons is his true name. If the name in the summons is Alfred Brown, and the true name of the defendant is Albert Browne, he should return that he served the summons on Alfred Brown, the within-named defendant, whose true name is Albert Browne.

§ 121. **Insufficient evidence of service.** In *O'Brien v. Shaws Flat and T. C. Co.*, 10 Cal. 343, where the return of the sheriff showed that he served the summons "upon James Street, one of the proprietors of the company," the court held it was not sufficient evidence of service to give the court jurisdiction, and that the summons might, with as much propriety, have been served upon any stranger.

A summons from a justice's court was addressed to defendants Adams & Co. The constable returned that he had served it "by leaving a copy thereof with Captain Charles B. Macy," with the date. Judgment by default thereon was held bad. The court said the justice could, with as much propriety, have entered judgment on a certificate of service upon any other person. (*Adams v. Towne*, 3 Cal. 247.) The sheriff's return that the summons was served on one of the members is *prima facie* evidence of that fact. (*Wilson v. Spring Hill Co.*, 10 Cal. 445.)

§ 122. **Variation of name—Idem sonans.** When the service is required to be made upon "Arthur" P., a return showing service upon "A." P. is insufficient. (*Waterman v. Phinney*, 1 Wash. 415.)

The question of *idem sonans* is one of pronunciation, not of spelling. A return of service upon "Rose" K., "one of the defendants," is sufficient to support a default against "Rosa" K., the names being substantially the same and the identity *prima facie* established. (*Galliano v. Kilfoy*, 94 Cal. 86, 29 Pac. 416.)

§ 123. **Informal return — Presumptions.** Where the return on a summons states that a copy of the summons was personally served on the defendant in the action, giving the time and place, this return, although informal, is held in *Drake v. Duvenick*, 45 Cal. 455, to be sufficient to give the court jurisdiction of the person, so that the judgment is not void for want of jurisdiction, when collaterally attacked. Also, *held* that while such return does not show that a copy of the complaint was not delivered to the defendant personally, it has at least some legal tendency to prove that it was so delivered. Also, that if, in such a case, there is more than one defendant, the fact that the return does not state that a copy of the complaint was served with the summons, does not render the judgment void in a collateral attack.

The following return was held to be good in the case of *Cardwell v. Sabichi*, 59 Cal. 490: "I hereby certify that I have served the within summons by delivering a copy thereof, together with true copy of complaint, personally, at the township and county of Los Angeles, this twenty-fifth day of April, 1879.

W. Bettis, constable," etc. It will be observed that this return fails to state upon whom summons was served, but as there was but one defendant, the court could determine that the service was made upon him. Nor does it state that the copy of complaint delivered was a copy of the complaint in the action mentioned in the summons. It also fails to state that the service was personal, but only that the officer acted in person. The return was held to be sufficient proof of service; as, whatever may be the difference between superior and inferior courts, with reference to presumptions indulged in their favor, there is none between sheriffs and constables (*Pol. Code, sec. 4315*); and the return of a sheriff is *prima facie* evidence of the facts stated (*Pol. Code, sec. 4178*); and by force of section 4315 the same effect is given to a constable's return.

§ 124. **General return sufficient.** Where a general power of serving process is given to an officer, a general return is sufficient. (*McMillan v. Reynolds*, 11 Cal. 379.) The following cases are also cited in point to prove the sufficiency of such a return: (*Cantley v. Moody*, 7 Port. (Ala.) 443; *Lenoir v. Broadhead*, 50 Ala. 58; *Holsinger v. Dunham*, 11 Ind. 346; *Chandler v. Miller*, 11 Ind. 382; *Keithley v. Borum*, 12 How. (Miss.) 683; *Crane v. Brannan*, 3 Cal. 195, 196.)

In its opinion in the case of *Cardwell v. Sabichi*, 59 Cal. 490, the court cited sections 411, 415, and 849 of the Code of Civil Procedure, and sections 4176 and 4315 of the Political Code, and further said:—

"In *Legg v. Stillman et al.*, 2 Cow. 418, which was *certiorari* to a justice's court, the suit was by summons in the court below, and the return on the

summons was as follows: 'Personally served May 14, 1822. Fees, \$0.13. Thomas McKnight, Const.' The return was held sufficient. In the case cited, the objection to the judgment was made in a collateral action, as in the case before us for decision. The judgment was adjudged valid. Our views in this case are in accord with the ruling in *Legg v. Stillman*, which ruling meets our approval. In the case cited, the time and manner of service were shown, and in this case, the time, manner, and place of service appear. In neither case is defendant mentioned, either by name or by being designated as defendant. As to the point that the return does not show that the copy of the complaint served was the copy of the complaint in the action of *Perry et al. v. Wolfskill*, we have to say that we do not think it tenable. The return afforded some evidence that it was such copy, and we cannot say that the proof in this regard was not sufficient to authorize the justice to render a judgment by default. (*See Code Civ. Proc., sec. 871; Drake v. Duvenick*, 45 Cal. 455.)"

§ 125. **Return of deputy must be made in name of sheriff.** The return of a deputy sheriff, on a process served, is a nullity, unless made in the name of the sheriff. (*Rowley v. Howard*, 23 Cal. 402.) A summons was served by a deputy sheriff, and returned with the following signature to the return: "Elijah T. Cole, D. S." It was held that this return was insufficient to give the court jurisdiction, or authorize him to enter a default judgment.

§ 126. **Return when not served by officer.** An affidavit of service of summons in California by a

person other than the sheriff should state that such person was over the age of eighteen at the time of such service, and not a party to the action. (*See, also, sec. 104 ante.*)

§ 127. **Sheriff's return not traversable.** The return of the sheriff upon process or notices is *prima facie* evidence of the facts in such return stated. (*California. Pol. Code, sec. 4178*); and, *held* in *Egery v. Buchanan*, 5 Cal. 56, that a sheriff's return is not traversable, nor can it be attacked collaterally, even if he has been guilty of fraud or collusion. While the courts may sometimes, under certain circumstances, overlook irregularities in officers' returns, they will not do so in all cases. The language of the law relating to the service of process should be closely studied, its directions strictly followed, and the return should be made in strict accordance with the acts performed, as expressed in the statutory directions laid down for the officer's observance. Yet, while it is advisable in all cases to literally comply with the provisions of the law, nothing short of a substantial departure therefrom can properly be held to be fatal to a proceeding under it.

"Its provisions and all proceedings under it are to be liberally construed with a view to effect its object and to promote justice." (*Code Civ. Proc., sec. 4.*) For example: In California the name of the plaintiff's attorney must be indorsed on the summons. (*Code Civ. Proc., sec. 407.*) In the case of *Shinn v. Cummins*, 65 Cal. 97, 3 Pac. 133, where the name of plaintiff's attorney appeared on the face and not on the back of the summons, it was held that defendant was not prejudiced by plaintiff's failure to literally comply with the statute.

§ 128. **No service after return.** Where a summons has been returned, it is *functus officio*, and subsequent service on defendant of a copy made by plaintiff from the files of the court is a nullity. (*Fanning v. Foley*, 99 Cal. 336, 33 Pac. 1098.)

After a summons has been served on some of the defendants and returned, it is competent for the court to order it delivered to the plaintiff for further service on other defendants in the same or another county. (*Hancock v. Pruess*, 40 Cal. 572.)

§ 129. **Erasures in return.** Where the judgment of the court recites that the summons was served on the defendant, the fact that, years afterward, there appears some erasure or interlineation on the sheriff's return, is not sufficient to nullify the return, in the absence of a direct attack upon it for fraud, or forgery or alteration. (*Gregory v. Ford*, 14 Cal. 138, 73 Am. Dec. 639.)

§ 130. **Correction of return.** The sheriff may correct and may be compelled to correct a defective return, but not to alter a return which is regular on its face. (*Washington M. Co. v. Kinnear*, 1 Wash. Terr. 99.)

§ 131. **Amended summons—Service of.** Where an amended complaint is filed before the defendants have been brought into court and an amended summons issued, a statutory provision requiring an amended complaint to be "served on the defendants affected thereby" (*California. Code Civ. Proc., sec. 432*), does not require a mode of service of summons differing from other cases. (*Dowling v. Comerford*, 99 Cal. 204, 33 Pac. 853.)

§ 132. **Criminal summons against corporation.** In California provision is made for criminal proceedings against a corporation, by the issuance of a summons after information or presentment. The form of the summons and the time and manner of service are also prescribed. (*California. Pen. Code, secs. 1390-1392.*)

§ 133. **Summons in justices' courts.** Section 849 of the Code of Civil Procedure provides that a summons issued by a justice of the peace may be served by a sheriff or constable of any of the counties of this state, or by any other person of the age of eighteen years or over, not a party to the action.

§ 134. **Summons in justices' courts—Service outside the county.** When a summons issued by a justice of the peace is to be served out of the county in which it was issued, the summons must have attached to it a certificate under seal by the county clerk of such county, to the effect that the person issuing the same was an acting justice of the peace at the date of the summons. The copy of summons served by the officer should have attached to it a copy of such certificate. (*California. Code Civ. Proc., sec. 849.*)

§ 135. **Unauthorized service set aside.** When a summons in a justice's court action is served outside of the county, contrary to the statute, the justice of the peace may entertain a motion to set aside the service, such motion being made upon affidavits showing the grounds. (*History Co. v. Light, 97 Cal. 56, 31 Pac. 627.*)

CHAPTER V.

SUBPŒNAS AND CITATIONS.

- § 136. Subpœna for witness defined.
- § 137. Civil subpœna—By whom issued.
- § 138. Issuance by justice of peace.
- § 139. May be issued with blank.
- § 140. How served—Witness fees.
- § 141. Failure to pay or tender witness fees.
- § 142. Witness on behalf of the state.
- § 143. Production of prisoner as witness.
- § 144. Witness before supervisors.
- § 145. Witness out of county—Attendance.
- § 146. Concealed witness.
- § 147. Witness protected from arrest.
- § 148. When arrest of witness is void.
- § 149. Liability of officer for detention of witness.
- § 150. Discharge of witness from arrest.
- § 151. Arrest and commitment for contempt.
- § 152. Criminal subpœna—By whom issued.
- § 153. By whom and how served.
- § 154. Production of prisoner as witness.
- § 155. Witness out of county—Attendance.
- § 156. Expense of witness.
- § 157. Citation defined.
- § 158. Service of citation.

§ 136. **Subpoena for witness defined.** “The process by which the attendance of a witness is required is a subpœna. It is a writ or order directed to a person and requiring his attendance at a particular time and place to testify as a witness. It may also require him to bring with him any books, documents, or other things under his control which he is bound

by law to produce in evidence," in which last case it is termed a subpœna *duces tecum*. (*California. Code Civ. Proc.*, sec. 1985.)

CIVIL SUBPŒNA.

§ 137. **Civil subpoena—By whom issued.** A subpoena in a civil action or proceeding is issued as follows:—

"1. To require attendance before a court, or at the trial of an issue therein, it is issued under the seal of the court before which the attendance is required, or in which the issue is pending.

"2. To require attendance out of the court, before a judge, justice or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it is issued by the judge, justice or any other officer before whom the attendance is required.

"3. To require attendance before a commissioner appointed to take testimony by a court of a foreign country, or of the United States, or of any other state in the United States, or of any other district or county within this state, or before any officer or officers empowered by the laws of the United States to take testimony, it may be issued by any judge or justice of the peace in places within their respective jurisdiction, with like power to enforce attendance; and, upon certificate of contumacy to said court, to punish contempt of their process, as such judge or justice could exercise if the subpoena directed the attendance of the witness before their courts in a matter pending therein." (*California. Code Civ. Proc.*, sec. 1986.)

§ 138. **Issuance by justice of peace.** "Justices of the peace may issue subpœnas in any action or proceeding in the courts held by them, and final process on any judgment recovered therein, to any part of the county." (*California. Code Civ. Proc., sec. 919.*)

§ 139. **May be issued with blank.** "The summons, execution, and every other paper made or issued by a justice, except a subpœna, must be issued without a blank left to be filled by another, otherwise it is void." (*California. Code Civ. Proc., sec. 920.*)

§ 140. **How served—Witness fees.** "The service of a subpœna (in civil proceedings) is made by showing the original and delivering a copy, or a ticket containing its substance to the witness personally, giving or offering to him at the same time, if demanded by him, the fees to which he is entitled for travel to and from the place designated, and one day's attendance there. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. Such service may be made by any person." (*California. Code Civ. Proc., sec. 1987.*)

In California witnesses are allowed, for attending in any civil suit or proceeding, before any court of record, referee, commissioner, or justice of the peace, for each day, two dollars; for traveling to the place of the trial, for each mile, twenty cents, excepting for witnesses before a justice of the peace in Monterey County, in civil cases, who are entitled to two dollars per day, but no mileage. In case of impeachment and contested elections, for traveling to the

place of trial, ten cents per mile. (*Stats.* 1869-1870, pp. 178, 179.)

“Witnesses summoned to testify on behalf of the county in matters of public concern before the board of supervisors are not entitled to have their fees pre-paid; but the board must allow them reasonable compensation for the expenses of their attendance.” (*County Govt. Act, secs.* 32, 33; *Stats.* 1893, p. 361; *Pol. Code, sec.* 4069.)

§ 141. **Failure to pay or tender witness fees.** No person shall be obliged to attend and testify in a civil action, unless his fees shall have been tendered, or he shall have not demanded the same. (*California. Code Civ. Proc., sec.* 1987.)

§ 142. **Witness on behalf of the state.** Sections 43 and 44 of an act to regulate fees, approved March 5, 1870, (*California*) provides as follows:—

“The attorney-general, or any district attorney, is authorized to cause subpœnas to be issued, and compel the attendance of witnesses on behalf of the state, without paying or tendering fees in advance, to either officers or witnesses; and any witness refusing or failing to attend, after being served with a subpœna, may be proceeded against, and shall be liable in the same manner as is provided by law in other cases where fees have been tendered or paid.

“The clerk of any court before which any witness shall have attended on behalf of the state, in any civil action, shall give to such witness a certificate, under seal, of travel and attendance, which shall entitle him to receive the same from the state treasury on the controller’s warrant.” (*California. Stats.* 1869-1870, p. 180. *See, also, Pen. Code, sec.* 1326.)

§ 143. **Production of prisoner as witness.** “If the witness be a prisoner, confined in a jail or prison within this state, an order for his examination in the prison upon deposition, or for his temporary removal and production before a court or officer, for the purpose of being orally examined, may be made as follows: (1) By the court itself in which the action or special proceeding is pending, unless it be a justice’s court; (2) By a justice of the supreme court, or a judge of the superior court of the county where the action or proceeding is pending, if pending before a justice’s court, or before a judge or other person out of court. Such order can only be made on the motion of a party, upon affidavit showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality. If the witness be imprisoned in the county where the action or proceeding is pending, his production may be required. In all other cases, his examination, when allowed, must be taken upon deposition.” (*California. Code Civ. Proc., secs. 1995-1997.*)

§ 144. **Witness before supervisors.** In California provision is made for the issuance of a subpœna by the chairman of the board of supervisors, commanding the witness to appear before the board. This subpœna is to be served by the sheriff, and for disobedience thereto the witness may be arrested by attachment issued by a judge of the superior court, who may impose the same penalties as in case of a witness subpœnaed to appear and give evidence on the trial of a civil cause before a superior court. (*California. County Govt. Bill, secs. 28, 29.*)

§ 145. **Witness out of county—Attendance.** “A witness is not obliged to attend as a witness before any court, judge, justice, or any other officer, out of the county in which he resides (in civil proceedings), unless the distance be less than thirty miles from his place of residence to the place of trial.” (*California. Code Civ. Proc., sec. 1989.*)

§ 146. **Concealed witness.** “If a witness is concealed in a building or vessel, so as to prevent the service of a subpœna upon him, any court or judge, or any officer issuing a subpœna, may, upon proof by affidavit of the concealment, and of the materiality of the witness, make an order that the sheriff of the county serve the subpœna; and the sheriff must serve it accordingly, and for that purpose may break into the building or vessel where the witness is concealed.” (*California. Code Civ. Proc., sec. 1988.*)

§ 147. **Witness protected from arrest.** “Every person who has been, in good faith, served with a subpœna to attend as a witness before a court, judge, commissioner, referee or other person, in a case where the disobedience of the witness may be punished as a contempt, is exonerated from arrest in a civil action while going to the place of attendance, necessarily remaining there and returning therefrom.” (*California. Code Civ. Proc., sec. 2067.*)

§ 148. **When arrest of witness is void.** “The arrest of a witness, contrary to the preceding section, is void, and when willfully made, is a contempt of the court; and the person making it is responsible to the witness arrested for double the amount of the

damages which may be assessed against him, and is also liable to an action at the suit of the party serving the witness with a subpœna, for the damages sustained by him in consequence of the arrest." (*California. Code Civ. Proc., sec. 2068.*)

§ 149. **Liability of officer for detention of witness.** "An officer is not liable to the party for making the arrest in ignorance of the facts creating the exoneration, but is liable for any subsequent detention of the party, if such party claim the exemption and make an affidavit stating:—

"1. That he has been served with a subpœna to attend as a witness before a court, officer, or other person, specifying the same, the place of attendance and the action or proceeding in which the subpœna was issued; and,

"2. That he has not thus been served by his own procurement, with the intention of avoiding an arrest;

"3. That he is at the time going to the place of attendance, or returning therefrom, or remaining there in obedience to the subpœna.

"The affidavit may be taken by the officer, and exonerates him from liability for discharging the witness when arrested." (*California. Code Civ. Proc., sec. 2069.*)

§ 150. **Discharge of witness from arrest.** The court or officer issuing the subpœna, and the court or officer before whom the attendance is required, may discharge the witness from an arrest made during the time he is exempt (*sec. 147 ante*). If the court have adjourned before the arrest, or before applica-

tion for the discharge, a judge of the court may grant the discharge. (*California. Code Civ. Proc., sec. 2070.*)

§ 151. **Arrest and commitment for contempt.** “Disobedience to a subpœna, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court or officer issuing the subpœna or requiring the witness to be sworn;” and “every warrant to arrest or commit a witness must be directed to the sheriff of the county where the witness may be, and must be executed by him in the same manner as process issued by the superior court.” (*California. Code Civ. Proc., secs. 1991, 1994.*)

CRIMINAL SUBPŒNA.

§ 152. **Criminal subpoena—By whom issued.** In California a subpœna in any criminal proceeding may be signed and issued by:—

“1. A magistrate before whom an information is laid, for witnesses in the state, either on behalf of the people or of the defendant.

“2. The district attorney, for witnesses in the state, in support of the prosecution, or for such other witnesses as the grand jury, upon an investigation pending before them, may direct.

“3. The district attorney, for witnesses in the state, in support of an indictment to appear before the court in which it is to be tried.

“4. The clerk of the court in which the indictment is to be tried; and he must, at any time, upon application of the defendant, and without charge, issue as

many blank subpœnas, subscribed by him as clerk, for witnesses in the state, as the defendant may require." (*California. Pen. Code, sec. 1326.*)

§ 153. **By whom and how served.** "A subpœna may be served by any person, but a peace officer must serve in his county any subpœna delivered to him for service, either on the part of the people or of the defendant, and must, without delay, make a written return of the service, subscribed by him, stating the time and place of service. The service is made by delivering a copy of the subpœna to the witness, and if he so requests, showing him the original and informing him of the contents. (*California. Pen. Code, sec. 1328.*)

§ 154. **Production of prisoner as witness.** In California provision is made for the removal of a prisoner from the state prison or the county jail of another county upon order of any court of record or judge thereof when his testimony is required in a criminal action; and the sheriff is required to execute such order. (*California. Pen. Code, sec. 1333.*)

§ 155. **Witness out of county—Attendance.** "No person is obliged to attend as a witness before a court or magistrate out of the county where the witness resides or is served with the subpœna, unless the judge of the court in which the offense is triable, or a justice of the supreme court, or a superior court judge, upon an affidavit of the district attorney or prosecutor, or of the defendant or his counsel, stating that he believes the evidence of the witness is material and his attendance at the examination or trial nec-

essary, shall indorse on the subpœna an order for the attendance of the witnesses." (*California. Pen. Code, sec. 1330.*)

§ 156. **Expense of witness.** "When a person attends before a magistrate, grand jury, or court, as a witness in a criminal case, upon a subpœna, or in pursuance of an undertaking, and it appears that he has come from a place outside of the county, or that he is poor and unable to pay the expenses of such attendance, the court, at its discretion, if the attendance of the witness be upon a trial, by an order upon its minutes, or, in any other case, the judge, at his discretion, by a written order, may direct the county auditor to draw his warrant upon the county treasurer in favor of the witness for a reasonable sum, to be specified in the order, for the necessary expenses of the witness." (*California. Pen. Code, sec. 1329.*)

CITATION.

§ 157. **Citation defined.** A citation is a direction issued by the clerk of a court of record under seal of the court, requiring the person cited to appear at a time and place specified. (*California. Code Civ. Proc., sec. 1707.*)

§ 158. **Service of citation.** A citation must be served in the same manner as a summons in a civil action, and must be served at least five days before the return day thereof. (*California. Code Civ. Proc., secs. 1709, 1711.*)

CHAPTER VI.

ARREST AND BAIL.

- § 159. Restrictions upon imprisonment in civil actions.
- § 160. Arrest for fraud.
- § 161. The order of arrest.
- § 162. Temporary exemptions from arrest.
- § 163. Remedy, when applicable.
- § 164. Void order of arrest.
- § 165. Service of order of arrest.
- § 166. Sheriff's expenses.
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- § 169. Surrender of defendant.
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- § 173. No action for escape or rescue after recapture.
- § 174. Exception to sureties.
- § 175. Justification of sureties.
- § 176. Deposit of bail money.
- § 177. Sheriff liable for escape.
- § 178. Discharge final.

§ 159. **Restrictions upon imprisonment in civil actions.** The constitutions of nearly all the states contain a provision similar to that in the declaration of rights of the constitution of California, to wit: that "no person shall be imprisoned for debt in any civil action, on mesne or final process, except in cases of fraud, nor in civil actions for torts, except in cases of willful injury to person or property; and no person shall be imprisoned for a militia fine in time of peace." (*California. Const., art. I, sec. 15.*)

§ 160. **Arrest for fraud.** Provision is usually made by statute, more or less similar to that in force in California, which provides for the arrest of the defendant in a civil suit, in the following cases: "(1) In an action for the recovery of money or damages on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the state with intent to defraud his creditors; (2) in an action for a fine or penalty, or for money or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent, or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity; or for misconduct or neglect in office or in a professional employment, or for a willful violation of duty; (3) in an action to recover the possession of personal property unjustly detained, when the property, or any part thereof, has been concealed, removed, or disposed of, to prevent its being found or taken by the sheriff; (4) when the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought; or in concealing or disposing of the property for the taking, detention, or conversion of which the action is brought; (5) when the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors." (*California. Code Civ. Proc., sec. 479.*)

§ 161. **The order of arrest.** The order for the arrest must be obtained from the judge of the court in which the action is brought, and is made upon the affidavit of the plaintiff or some other person; and

must require the sheriff of the county where the defendant may be found forthwith to arrest him and hold him to bail in a specified sum. (*California. Code Civ. Proc., secs. 480-483.*)

§ 162. **Temporary exemptions from arrest.** In California, the constitution provides that "electors shall in all cases, except treason, felony, or breach of the peace, be privileged from arrest on the days of election, during their attendance at such election, going to and returning therefrom" (*art. II, sec. 2*), and that "members of the legislature shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest, and shall not be subject to any civil process during the session of the legislature, nor for fifteen days next before the commencement and after the termination of each session." (*Art. IV, sec. 2.*)

"No person belonging to the military forces is subject to arrest on civil process while going to, remaining at, or returning from, any place at which he may be required to attend for military duty." (*California. Pol. Code, sec. 2021.*)

"Every person who has been, in good faith, served with a subpœna to attend as a witness before a court, judge, commissioner, referee, or other person, in a case where the disobedience of the witness may be punished as a contempt, is exonerated from arrest in a civil action while going to the place of attendance, necessarily remaining there, and returning therefrom." (*California. Code Civ. Proc., sec. 2067.*)

§ 163. **Remedy, when applicable.** To entitle the party to the remedy of arrest, it is not necessary

that he should know the commission of a fraud. It is sufficient, if the circumstances detailed would induce a reasonable belief that a fraud was intended. (*Southworth v. Resing*, 3 Cal. 377.)

A fraud merely constructive, not involving moral guilt, is not ground of arrest. A partner is not liable to arrest on the ground of fraud committed by his copartners in contracting the partnership debt on which the action is brought, in the absence of proof that he knew of such fraud, or that he in some way ratified the transaction. But an officer is not presumed to know the nature of the evidence relied upon by the plaintiff to prove his case; it is sufficient for him to know that the process is regular on its face, to warrant him in serving it. Whatever may be the defect in the affidavit upon which the order of arrest is issued, the order itself, if regular on its face, will protect the officer in executing it. It was so held in *Dusy v. Helm*, 59 Cal. 189, and section 4187 of the Political Code was cited by the court as statutory authority for the decision.

§ 164. **Void order of arrest.** Where the complaint was not filed until two days after an order of arrest had issued thereon, it was held in *Ex parte Cohen*, 6 Cal. 318, that the order of arrest was void.

§ 165. **Service of order of arrest.** Upon receipt of an order of arrest, with a copy of the affidavit upon which it is made, the sheriff must arrest the defendant and keep him in custody until discharged by law. On making the arrest, the officer must deliver to the defendant a copy of the affidavit, and also, if he desire it, a copy of the order of arrest. (*California. Code Civ. Proc., sec. 484.*)

§ 166. **Sheriff's expenses.** In California it is provided by the Penal Code that "whenever a person is committed upon process in a civil action or proceeding, except when the people of this state are a party thereto, the sheriff is not bound to receive such person, unless security is given on the part of the party at whose instance the process is issued, by a deposit of money, to meet the expenses for him of necessary food, clothing, and bedding, or to detain such person any longer than these expenses are provided for. This section does not apply to cases where a party is committed as a punishment for disobedience to the mandates, process, writs or order of court." (*Pen. Code, sec. 1612.*)

The Code of Civil Procedure also provides that "whenever a person is committed to jail on an execution issued on a judgment recovered in a civil action, the creditor, his agent or attorney, must advance to the jailer, on such commitment, sufficient money for the support of the prisoner for one week, and must make the like advance for every successive week of his imprisonment, and in case of failure to do so, the jailer must forthwith discharge such prisoner from custody; and such discharge has the same effect as if made by order of the creditor." (*California. Code Civ. Proc., sec. 1154.*)

§ 167. **Failure to pay expenses.** If a judgment is rendered against a defendant in a civil action, convicting him of fraud, and he is imprisoned on an execution issued thereon, the failure of the plaintiff to make a weekly advance to the jailer, of money sufficient for the support of the prisoner, does not *per se* operate a discharge of the defendant. If the

prisoner is adequately supported by the jailer, and the latter is willing to trust the creditor for reimbursement, the purpose of the statute is satisfied. (*Ex parte Lamson*, 50 Cal. 306.)

§ 168. **When defendant may be discharged.** The sheriff may discharge the defendant at any time upon written instructions to that effect, signed by the plaintiff. And the defendant, at any time before execution, must be discharged from the arrest either upon giving bail, as required by the statute, or upon depositing the amount mentioned in the order of arrest. (*California. Code Civ. Proc., sec. 486.*) A party will be discharged from arrest where the process, though proper in form, has been issued in an improper case. (*Soule v. Hayward*, 1 Cal. 345.)

§ 169. **Surrender of defendant.** At any time before judgment, or within ten days thereafter, the bail may surrender the defendant in their exoneration; or he may surrender himself to the sheriff of the county where he was arrested. For the purpose of surrendering the defendant, the bail, at any time or place before they are finally charged, may themselves arrest, or, by a written authority indorsed on a certified copy of the undertaking, may empower the sheriff to do so. A certified copy of the undertaking may be obtained from the clerk of the court in which the action is brought. (*California. Code Civ. Proc., secs. 488, 489.*)

§ 170. **Liability of sheriff and sureties.** Where a defendant has been allowed to go at large on bail, and an attempt is made to surrender him, either by

himself or by his sureties, the officer should take heed lest he make himself liable to the plaintiff by receiving the defendant into custody and thereby exonerate the sureties. In the case of *Allen v. Breslauer*, 8 Cal. 552, in an action on a bail bond executed by the defendants as sureties for one Pinover, the plaintiff obtained judgment against Pinover. There was no surrender of defendant, nor any execution issued within ten days after judgment. After the expiration of ten days, an execution was issued against the body of Pinover, and placed in the hands of the sheriff. On the same day Pinover called on the sheriff, and offered to surrender himself in discharge of his sureties. But the sheriff, acting under plaintiff's instructions, refused to take him into custody. Afterwards defendants went with Pinover to the sheriff, for the purpose of giving him in custody, when he refused to receive him. The court below entered judgment for plaintiff, but, on appeal, the supreme court reversed the judgment, filing an opinion which is here given in full:—

“The question presented is whether, under this state of facts, defendants are liable. We think not. The legislature, when providing for the surrender of defendant within ten days after judgment, evidently contemplated that the plaintiff should take such measures as would authorize the officer to hold defendant in custody. ‘The law requires no man to do a vain thing,’ is a familiar maxim, and certainly it would be in vain to require a party to surrender to an officer having no power to detain him. The construction contended for by plaintiff would enable a defendant to release his sureties by a surrender before execution, and then at once be released on *habeas*

corpus, on the ground that he was illegally in custody. Such a result was never intended by the legislature, and we are of opinion that a surrender within ten days after execution is a sufficient compliance with the will of the legislature. Judgment reversed."

§ 171. **Liable for permitting an escape.** "A sheriff who suffers the escape of a person arrested in a civil action, without the consent or connivance of the party in whose behalf the arrest or imprisonment was made, is liable as follows:—

"1. When the arrest is upon an order to hold to bail or upon surrender in exoneration of bail before judgment, he is liable to the plaintiff as bail.

"2. When the arrest is on an execution or commitment to enforce the payment of money, he is liable for the amount expressed in the execution or commitment.

"3. When the arrest is on an execution or commitment other than to enforce the payment of money, he is liable for the actual damages sustained.

"4. Upon being sued for damages for an escape or rescue, he may introduce evidence in mitigation and exculpation." (*California. County Govt. Bill, sec. 99; Stats. 1893, p. 372; Pol. Code, sec. 4182.*)

§ 172. **Liable for a rescue.** The sheriff is liable for a rescue of a person arrested in a civil action equally as for an escape. (*California. County Govt. Bill, sec. 100; Stats. 1893, p. 373; Pol. Code, sec. 4183.*)

§ 173. **No action for escape or rescue after recapture.** "An action cannot be maintained against the sheriff for a rescue, or for an escape of a person arrested upon an execution or commitment, if, after his rescue or escape and before the commencement of the action, the prisoner returns to the jail, or is retaken by the sheriff." (*California. County Govt. Bill, sec. 101; Stats. 1893, p. 373; Pol. Code, sec. 4184.*)

§ 174. **Exception to sureties.** "Within the time limited for that purpose, the sheriff must file the order of arrest with the clerk, with his return, together with a copy of the undertaking. The original undertaking he must retain, until the sureties justify, if they are required to do so. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he is deemed to have accepted them, and the sheriff is exonerated from liability. If no notice be served within ten days, the original undertaking must be filed with the clerk of the court." (*California. Code Civ. Proc., sec. 492.*)

§ 175. **Justification of sureties.** "Within five days after the receipt of notice, the sheriff or defendant may give to the plaintiff, or his attorney, notice of the justification of the same, or other bail (specifying the places of residence and occupations of the latter), before a judge of the court, or county clerk, at a specified time and place, the time to be not less than five nor more than ten days thereafter, except by consent of parties. In case other bail be given, there must be a new undertaking." If the bail is

found to be sufficient, the sheriff is thereupon exonerated from liability. (*California. Code Civ. Proc.*, secs. 493, 496.)

§ 176. **Deposit of bail money.** In case the amount of bail be reduced, the defendant may deposit such amount instead of giving bail. When money is deposited, the sheriff must give the defendant a certificate of the deposit made, discharge the defendant from custody, immediately pay the deposit into court, and take from the clerk receiving the same two certificates of such payment, the one of which he shall deliver to the plaintiff's attorney, and the other to the defendant. (*California. Code Civ. Proc.*, secs. 497, 498.)

§ 177. **Sheriff liable for escape.** "If, after being arrested, the defendant escape or is rescued, the sheriff is liable as bail, but he may discharge himself from such liability by giving bail at any time before judgment." (*California. Code Civ. Proc.*, sec. 501. *See, also, Pol. Code, sec. 4182.*)

§ 178. **Discharge final.** Where a party is once arrested and discharged, he cannot be arrested again in the same action. (*McGilvery v. Moorhead*, 2 Cal. 609.)

CHAPTER VII.

CLAIM AND DELIVERY.

- § 179. Affidavit and order to sheriff.
- § 180. Taking the property.
- § 181. Justification and retaking property.
- § 182. Replevin from officer holding under levy.
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- § 184. Notice of justification.
- § 185. Care of property in replevin.
- § 186. How property taken when concealed.
- § 187. Plaintiff's possession only temporary.
- § 188. Property to be segregated.
- § 189. Claim of property by third person.
- § 190. Sheriff is liable for taking property of stranger.
- § 191. Bond of indemnity to sheriff.
- § 192. Correction of valuation of property.
- § 193. Form of judgment.
- § 194. Judgment to be in the alternative.
- § 195. When judgment for damages alone proper.
- § 196. Particular description of property.
- § 197. Partial delivery of property.
- § 198. Property lost through act of God.
- § 199. Attachment lien in replevin.
- § 200. Attempted replevin from sheriff.

§ 179. **Affidavit and order to sheriff.** The duties of sheriffs and constables in taking, keeping, and delivering property in replevin under the practice in California, which is substantially the same as prevails throughout the Pacific states, are laid down in sections 609 to 620 of the Code of Civil Procedure.

The papers requisite to authorize the officer are: An affidavit made by the plaintiff or some one in

his behalf, showing that the plaintiff is the owner of the property claimed (particularly describing it), or is entitled to the possession thereof; that the property is wrongfully detained by the defendant; the alleged cause of detention thereof, according to his best knowledge, information, and belief; that it has not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution or an attachment against the property of the plaintiff, or if so seized, that it is by statute exempt from such seizure; the actual value of the property. The affidavit must have an indorsement thereon, in writing, by the plaintiff or his attorney, requiring the officer to take the property from the defendant. Besides the affidavit and notice referred to, there must be furnished to the officer a written undertaking executed by two or more sufficient sureties to the effect that they are bound to the defendant in double the value of the property, as stated in the affidavit, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may, from any cause, be recovered against the plaintiff. (*California. Code Civ. Proc., secs. 510-512.*)

§ 180. **Taking the property.** Upon receipt of the affidavit and notice and undertaking, the officer must indorse upon them the exact time of receipt, and sign his approval of the undertaking, and prepare a copy of each for service. No unnecessary time should then be lost in taking the property. If no property can be found, the officer runs no risk; while, on the other hand, if the property be taken, it need not be delivered to the plaintiff until the sureties on the undertaking shall have justified. "The sheriff must forth-

with take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody." (*California. Code Civ. Proc., sec. 512.*)

If the property is in the possession of any person other than the defendant or his agent, the officer will not be justified in taking it.

"He must, without delay, serve upon the defendant a copy of the affidavit, notice and undertaking, by delivering the same to him, personally, if he can be found, or to his agent from whose possession the property is taken, or if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion, or if neither have any known place of abode, by putting them in the nearest post-office, directed to the defendant." (*California. Code Civ. Proc., sec. 512.*)

§ 181. **Justification and retaking property.** Under the California practice, after the sheriff has taken property, "the defendant may, within two days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objection to them. When the defendant excepts, the sureties must justify on notice in like manner as upon bail on arrest, and the sheriff is responsible for the sufficiency of the sureties until the objection to them is either waived or until they justify." If the defendant does not except to the sureties he may retake the property as follows:—

"At any time before the delivery of the property to the plaintiff, the defendant may, if he do not ex-

cept to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant. If a return of the property be not so required within five days after the taking and service of notice to the defendant, it must be delivered to the plaintiff," unless it be claimed by a third person. (*California. Code Civ. Proc., secs. 513, 514.*)

§ 182. **Replevin from officer holding under levy.** When personal property which has been levied upon by the sheriff has been taken from him in replevin by the party claiming it, he should consult his own safety and proceed no further in the matter, but rest securely on the bond given by the plaintiff in the replevin suit. He may give an undertaking and retake the property; but if he pursue this course, he and his sureties will be liable to the claimant for its value. Having subsequently sold the property under the execution, and paid the proceeds to the plaintiff in execution, he may eventually be compelled to pay its value to the claimant.

§ 183. **Officer responsible until sureties justify.** If the defendant elect to retake the property, the officer is still to retain it until the defendant's sureties justify; unless, indeed, he is willing himself to take the risk of such justification. The effect of a

demand of the property by the defendant is not to entitle the defendant to have the property delivered to him, but to prevent a delivery of the property to the plaintiff. If the defendant would have the property himself, he must proceed to have his sureties justify. The property must be retained by the officer until such justification takes place, unless the officer chooses to make himself personally responsible that the sureties shall justify. (*California. Code Civ. Proc., sec. 515.*)

§ 184. **Notice of justification.** "The defendant's sureties, upon notice to the plaintiff of not less than two and not more than five days, must justify before a judge or county clerk, in the same manner as upon bail on arrest; and upon such justification the sheriff must deliver the property to the defendant. The sheriff is responsible for the defendant's sureties until they justify, or until the justification is completed or waived, and may retain the property until that time; if they, or others in their place, fail to justify at the time and place appointed, he must deliver the property to the plaintiff." (*California. Code Civ. Proc., sec. 515.*)

§ 185. **Care of property in replevin.** When the property is taken by the officer he must exercise the same care in keeping it as in holding property under attachment, and deliver it to the party entitled thereto, upon receiving his fees for taking and his necessary expenses for keeping the same.

§ 186. **How property taken when concealed.** "If the property, or any part thereof, be concealed in

a building or inclosure, the sheriff must publicly demand its delivery; if it be not delivered, he must cause the building or inclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county." (*California. Code Civ. Proc., sec. 517.*)

§ 187. **Plaintiff's possession only temporary.** The possession obtained by plaintiff in replevin is only temporary. It does not divest the title, or discharge the lien. (*Hunt v. Robinson, 11 Cal. 262.*)

§ 188. **Property to be segregated.** Replevin only lies for the recovery of specific personal property. Property which has not been set apart from the mass in which it is included is not specific property, and cannot be reached by an action of replevin. Just what will constitute a segregation must depend upon the circumstances of each particular case.

A safe in the possession of McC. belonging to W. F. & Co., for whom, as also for plaintiff, he was agent, contained six thousand dollars in coin. Of this sum, four hundred dollars belonged to W. F. & Co., the balance to plaintiff. Defendant, as sheriff, under a writ against McC., seized eighteen hundred dollars of the money in the safe as his property, and put it in a bag. Plaintiff then claimed the money as his, McC. being present and not objecting: *Held*, that this amounted to a segregation of the eighteen hundred dollars from the mass of coin in the safe, so as to sustain replevin by plaintiff. (*Griffith v. Bogardus, 14 Cal. 410.*)

§ 189. **Claim of property by third person.** "If the property taken be claimed by any other person

than the defendant or his agent, and such person make affidavit of his title thereto, or right to the possession thereof, stating the grounds of such title or right, and serve the same upon the sheriff, the sheriff is not bound to keep the property or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, indemnify the sheriff against such claim, by an undertaking, by two sufficient sureties; and no claim to such property by any other person than the defendant, or his agent, is valid against the sheriff unless so made." (*California. Code Civ. Proc., sec. 519.*)

The action of replevin cannot be maintained, under our laws, against a sheriff to recover the possession of personal property held by him under a writ of replevin, unless a claim upon him for such property has been first made as above provided. But when a third party claims the property, the officer should demand indemnity at once from the plaintiff, for he can no more take the property of a stranger under replevin than he can under attachment or execution, without rendering himself liable.

§ 190. **Sheriff is liable for taking property of stranger.** Where an order of court directed the sheriff to seize certain specific property, and this property was proved not to belong to the defendant in the suit, the sheriff was held liable to the owner. (*Rhodes v. Patterson, 3 Cal. 469.*) And further, that the owner of property has his remedy and the right of recovery, against any one, whether sheriff or not, unless it be held by legal process against himself.

In the case of *Bacon v. Robson*, 53 Cal. 399, the court held that in an action to recover personal property or its value, where it appears that the property came lawfully into the possession of the defendant, a demand and refusal to deliver must be shown. (*See, also, sec. 189 ante.*)

§ 191. **Bond of indemnity to sheriff.** If in a bond to indemnify a sheriff for replevying property claimed by a person other than the defendant in the writ, the obligors undertake to indemnify him from any damage he may sustain by reason of any costs, suits, judgments, and executions that shall come or be brought against him, the sheriff cannot maintain an action on the bond because a judgment has been recovered against him, but must first pay the judgment. (*Lott v. Mitchell*, 32 Cal. 23.)

§ 192. **Correction of the valuation of property.** "When, in an action to recover the possession of personal property, the person making any affidavit did not truly state the value of the property, and the officer taking the property, or the sureties on any bond or undertaking, is sued for taking the same, the officer or sureties may in their answer set up the true value of the property, and that the person in whose behalf said affidavit was made was entitled to the possession of the same when said affidavit was made, or that the value in the affidavit stated was inserted by mistake, the court shall disregard the value as stated in the affidavit, and give judgment according to the right of possession of said property at the time the affidavit was made." (*California. Code Civ. Proc., sec. 473.*)

§ 193. **Form of judgment.** By section 667 of the Code of Civil Procedure of California, it is provided that, "if the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had, and damages for taking and withholding the same"; and similar provisions exist in other states.

§ 194. **Judgment to be in the alternative.** The judgment in replevin must be in the alternative form,—i. e. either for possession of the property or for damages, etc.,—even though the property has been delivered to the plaintiff. (*Brichman v. Ross*, 67 Cal. 601, 8 Pac. 316. See, also, sec. 195, post.)

§ 195. **When judgment for damages alone proper.** When it appears on the trial in replevin that the property has been destroyed and cannot therefore be returned, a judgment for damages alone will not be reversed. (*Brown v. Johnson*, 45 Cal. 76.)

§ 196. **Particular description of property.** In replevin, where the judgment for the plaintiff describes the property to be restored as "buckwheat, valued at three hundred and sixty-five dollars and seventy-five cents," the description is insufficient to sustain the judgment, unless the judgment refer for a fuller description to the complaint, and there is a more definite description in the complaint. (*Welch v. Smith*, 45 Cal. 230.)

§ 197. **Partial delivery of property.** When judgment in replevin was rendered for the possession of

four hundred hogs or two thousand dollars, the value thereof, the sheriff failing to find more than ninety-six hogs, properly levied on other property to make up the remainder of the judgment. (*Black v. Black*, 74 Cal. 520, 16 Pac. 311.)

§ 198. **Property lost through act of God.** It is no defense to an action upon a replevin bond that the property was lost through the act of God.

In the case of *De Thomas v. Witherby*, 61 Cal. 92, 44 Am. Rep. 542, the plaintiff pleaded that two cows known as graded stock died, thereby rendering it impossible for plaintiff to return said cattle to defendants. It was held that this was no defense. The court said:—

“In some of the cases to which we have been referred, it has been held that the plaintiff, who obtains the possession of personal property by replevin, is excused from returning the same in case it has died since the seizure, without any neglect or default on the part of the party taking it. This was the doctrine laid down by the supreme court of New York, in *Carpenter v. Stevens*, 12 Wend. 589. . . . To the same effect is the case of *Melvin v. Winslow*, 10 Me. 397. But an examination of more recent cases and later authorities convinces us that the above cases do not lay down the correct rule on this subject. . . . The weight of authority is manifestly against excusing the party who has replevined goods, from returning the same or responding in damages for their value, because they have been lost by the act of God, and it appears to us that upon no sound principle can he be excused. A plaintiff not being the owner of goods who takes them out of the possession of the

real owner, holds them in his own wrong, and at his own risk. He has deprived the real owner of the possession, and has also deprived him of the means of disposing of the property pending the litigation; and when at the end of perhaps a protracted litigation it is determined that the plaintiff in the replevin suit had no right to the possession of the goods, and judgment is rendered against him for the return of the property or its value, he cannot, on principle or authority, be excused from satisfying such judgment under a plea that the property has been lost in his hands, even by the act of God."

§ 199. **Attachment lien in replevin.** The question as to whether the lien of attachment continues after the replevy of goods is decided affirmatively by the supreme court in the case of *Hunt v. Robinson*, 11 Cal. 262. This was an action against the sureties on a replevin bond, and the facts were as follows:—

Treadwell commenced suit against David Jones, by attachment, which was levied upon certain personal property by the plaintiff Hunt, as sheriff of Sacramento County. Mary Jones, wife of David Jones, claimed the property as a sole trader, and commenced her action of replevin, and obtained possession of the property, upon delivering the statutory undertaking executed by defendants, Robinson and Skinker. The replevin suit was decided on the 5th of February, 1855, in favor of Hunt, and a motion made for a new trial by Mrs. Jones, which motion was pending until March 9, 1855, when it was overruled. Treadwell obtained judgment against David Jones, November 30, 1854, for four thousand three hundred dollars. On the 18th of

February, 1855, certain executions in favor of *other* creditors of David Jones being in the hands of the plaintiff Hunt, were levied by him upon the same property, and the property sold about the last of February. The sheriff, being in doubt as to which of the several creditors was entitled to the proceeds of the sale, paid the money into the sixth district court, and filed his bill of interpleader, making Treadwell and the other creditors parties. Upon the hearing the district court decided that the second class of creditors were entitled to the proceeds. From this decision no appeal was taken by any party. On March 17, 1855, Hunt issued his execution upon the judgment obtained by him in the replevin suit, which was returned by the coroner unsatisfied. The sheriff then brought his suit against the sureties in the replevin bond, and obtained judgment against them for the assessed value of the property replevied and for costs, and the defendants appealed.

The supreme court decided that the lien of Treadwell's attachment continued after the replevy of the goods by Mary Jones, and that when the same property came into the hands of Hunt, as sheriff, the condition of the replevin bond, to return the property, was fulfilled. The property was then liable to a second levy, but such second levy was subject to the levy under the prior attachment.

§ 200. **Attempted replevin from sheriff.** The duties of the sheriff in case of a cross-suit in replevin are discussed and clearly laid down in the case of *Fleming v. Wells*, 65 Cal. 336, 4 Pac. 197. In that case it was held by the court, on appeal from a judg-

ment on the pleadings, that the sheriff cannot be held responsible in replevin for property of the plaintiff, taken by him on a prior replevin suit and regularly delivered to the plaintiff in that suit, but that the plaintiff as defendant in the first suit, should have given the statutory bond for redelivery instead of instituting an independent cross-action in replevin.

CHAPTER VIII.

INJUNCTION.

- § 200a. How served.
- § 200b. By whom served.
- § 200c. When may be served.
- § 200d. Sheriff must obey writ.

§ 200a. **How served.** In the absence of any statutory provision as to the manner of service of the writ of injunction, it is sufficient if service be made in the manner prescribed for service of summons. (*Golden Gate M. Co. v. Superior Court*, 65 Cal. 187, 3 Pac. 628.) In California, when the injunction is granted upon the complaint, a copy of the complaint and verification attached must be served with the injunction; when granted upon affidavit, a copy of the affidavit must be served with the injunction. (*Code Civ. Proc.*, sec. 527.)

§ 200b. **By whom served.** Although statutory provision is usually made that "the sheriff must serve all process," etc., such a provision does not impose upon him exclusively such duty; and in the absence of any express statute designating the persons by whom an injunction is to be served, it may be served by any person authorized by law to make service of summons. (*Golden Gate M. Co. v. Superior Court*, 65 Cal. 187, 3 Pac. 628.)

§ 200c. **When may be served.** Injunctions and writs of prohibition may be issued and served on

legal holidays and non-judicial days. (*California. Code Civ. Proc., sec. 76.*)

§ 200d. **Sheriff must obey writ.** Where a sheriff levies on and is about to sell property of an execution debtor, and the defendant in execution obtains from the court in which the judgment was rendered an injunction restraining the plaintiff in the judgment, his servants, etc., from proceeding to sell under such execution, and this injunction is served upon the sheriff, who in defiance of it afterwards makes the sale, he is a naked trespasser, and liable in damages—even though he be not a party to the injunction suit. It was so held in the case of *Buffandeau v. Edmondson*, 17 Cal. 437, 79 Am. Dec. 139, and that it was “unnecessary to consider whether the bill of complaint showed a proper case for an injunction, or whether the injunction was regularly granted or not. It was enough for the sheriff to know that a court of competent jurisdiction had made the order, and then it became his duty to obey it.”

CHAPTER IX.

ATTACHMENT—GENERALLY.

- § 201. Nature and object of writ.
- § 202. Issuance before summons void.
- § 203. Regularity of writ.
- § 204. What the writ must state.
- § 205. Justice's court attachment.
- § 206. Original writ to be kept in sheriff's office.
- § 207. Instructions to sheriff.
- § 208. Attachment void for want of proper undertaking.
- § 209. Irregularity in issuance of attachment.
- § 210. Attachment where the debt is not due.
- § 211. Contract made out of state.
- § 212. Right to intervene.
- § 213. Receipt and levy on holiday.
- § 214. Attachment—Levy before service of summons.
- § 215. No notice to defendant necessary.
- § 216. What may be levied upon.
- § 217. When property not attachable.
- § 218. Property in custody of the law.
- § 219. Attachment lien—How enforced.
- § 220. Attachment not affected by new summons.
- § 221. Conflicting attachments.
- § 222. Priority of levy—Sheriff and deputy.
- § 223. Inventory and return of the writ.
- § 224. What the return should contain.
- § 225. Return—When not amendable.
- § 226. Return on second writ.
- § 227. Preferred labor claims.
- § 228. Service of notice.

§ 201. **Nature and object of writ.** An attachment is a process under which the debtor's property may be seized and held as security for the satisfac-

tion of any judgment that may be recovered against him in the action, unless he gives security for the payment of the judgment, in the manner provided by the statute. The object of the writ of attachment is to secure, in the interest of the plaintiff, sufficient property belonging to the defendant to satisfy the plaintiff's claim. The purpose of the lien is to secure the payment of the judgment, and this is accomplished by its holding the property until the judgment is rendered—and in case of real property, until the judgment is or may be docketed—so that the attached property may be taken and sold under an execution to be issued on the judgment. It enables the sheriff to seize the property of the debtor and to hold it until the court can determine the respective rights of the parties by a judgment. This being the object of the writ, it is clearly the duty of the officer to use all due diligence in the service thereof. Any delay on his part may defeat this object, and render him liable to the plaintiff for whatever loss may be thereby sustained.

§ 202. **Issuance before summons void.** When the statute provides that the plaintiff “at the time of issuing the summons, or any time afterward, may have the property of the defendant attached,” these provisions must be strictly followed, and the attachment, if issued before the summons, is a nullity. The issuance of the summons afterwards cannot cure that which was void from the beginning. (*Low v. Henry*, 9 Cal. 538.)

It is not presumed that a county clerk or a justice of the peace will issue a writ of attachment before the summons. Such a procedure could only arise

through the grossest negligence, and would not be excusable upon any plea of confusion caused by haste or multiplicity of duties requiring immediate attention at the time of error. But if a sheriff receive information that no summons has been issued at the time the writ is placed in his hands, he will serve the writ at his peril.

§ 203. **Regularity of writ.** It is an old principle of law that, on the reception of a ministerial writ, it is the duty of the officer to obey its mandate, if it be regular on its face and issued by competent authority; if there be any irregularity in its issuance, which does not so appear, such irregularity affects the parties, but not the ministerial officer. It is incumbent upon the officer, therefore, before making service of process, to examine the same, and satisfy himself upon these points. (*See, also, secs. 59, ante, 344, 345, 547, post.*)

§ 204. **What the writ must state.** Under the California code provision (*Code Civ. Proc., sec. 540*) "the writ must be directed to the sheriff of any county in which property of such defendant may be, and must require him to attach and safely keep all the property of such defendant within his county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant give him security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached, in which case, to take such undertaking."

§ 205. **Justice's court attachment.** Where a writ of attachment issued by a justice of the peace is to be served out of the county in which it was issued, the writ of attachment shall have attached to it a certificate under seal, by the county clerk of such county, to the effect that the person issuing the same was an acting justice of the peace of said county at the date of the writ. (*California. Code Civ. Proc., sec. 1905.*)

§ 206. **Original writ to be kept in sheriff's office.** The officer should make the levy with a copy of the writ, leaving the original writ, in all cases, at his office. He need not give an attaching creditor notice of the levy of his attachment, nor need he serve a copy of the writ upon the defendant. The latter is entitled to a copy, if he demand it, upon payment of the lawful fee therefor; but if the officer have no copy with him at the time, it may be delivered to him thereafter.

§ 207. **Instructions to sheriff.** The writ should be accompanied with written instructions directing the officer as to the property to be attached; and when the property is real property, the directions should state in whose name the property stands of record. The best form of instruction to the sheriff should contain such a description as would give satisfaction if contained in a deed; for, if the cause is prosecuted to judgment and sale, and a deed pass to the purchaser, the description of the land given in the first proceeding will follow to the deed. Although the officer is bound to attach property belonging to the defendant without written instructions

to do so, if he know of any that is not exempt within the county, yet, if such directions are not given, he may afterwards seek to excuse himself from neglect by pleading ignorance or uncertainty of ownership. Where specific instructions are given in writing, the party desiring the levy and the officer at once arrive at a mutual understanding as to the work to be done.

In California “no directions or authority by a party or his attorney, to a sheriff, in respect to the execution of process or return thereof, or to any act or omission thereto, is available to discharge or excuse the sheriff from a liability for neglect or misconduct, unless it is contained in a writing signed by the attorney of the party, or by the party, if he has no attorney.” (*California. Pol. Code, sec. 4185.*)

§ 208. **Attachment void for want of proper undertaking.** Where the undertaking given on issuing an attachment from a justice’s court was to the effect that plaintiff would pay all costs, etc., and the damages the defendant might sustain by reason of the attachment, “not exceeding one hundred dollars”: *Held*, that the undertaking was bad, and rendered the attachment void because not issued in substantial conformity with the provision of the 553d section of the Practice Act. (*Hisler v. Carr, 34 Cal. 641.*) In the same case it was held that where the affidavit failed to show that the plaintiff had a cause of action against defendant, the summons which was made returnable more than ten days from its date was void, as was also an attachment issued in the same case.

§ 209. **Irregularity in issuance of attachment.** Where an attachment was issued on a complaint, which was a printed form, with the blanks filled up by the clerk, at the request of plaintiff, but no name signed to it till next day, and after other attachments on the same property, when it was signed by the clerk, with the name of the plaintiff's attorney: *Held*, that the action of the clerk, though not correct, was only an irregularity, and the complaint was not void. (*Dixey v. Pollock*, 8 Cal. 570.)

If an attachment be issued and levied in an action for a debt which has been secured by a mortgage, the case not being one in which the statute allows such writ, the attachment should be dissolved on proper motion. (*Kinsey v. Wallace*, 36 Cal. 462.)

§ 210. **Attachment where the debt is not due.** An attachment issued upon a debt not due is void as against creditors whose rights are injuriously affected by it. But where goods were fraudulently purchased by an insolvent, the creditor may attach before the maturity of the debt, and other creditors, subsequently attaching, cannot complain that the suit was prematurely brought. The debt in such case is equitably due, and there being no actual fraud against subsequent creditors, they cannot be preferred in equity, even if the suit could have been defeated by the debtor himself. (*Patrick v. Montader*, 13 Cal. 435; *Davis v. Eppinger*, 18 Cal. 379, 79 Am. Dec. 184.)

§ 211. **Contract made out of state.** If a contract is not made in the state, there must be an express stipulation that it shall be paid in the state, in order

to authorize the issuance of an attachment in an action upon it.

§ 212. **Right to intervene.** Where a subsequent attaching creditor has his attachment levied on the property previously levied on by a prior attaching creditor, he is entitled to intervene in the action between the first attaching creditor and the defendant, if the first attachment was fraudulently procured, and the common debtor has not sufficient property to pay both claims. (*Coghill v. Marks*, 29 Cal. 673.)

§ 213. **Receipt and levy on holiday.** In the absence of a statutory authority, a writ of attachment placed in the hands of the sheriff on a holiday cannot be officially received by him on that day. It can only be considered officially in his hands when the holiday has expired. (*Whitney v. Butterfield*, 13 Cal. 335, 73 Am. Dec. 584.)

In some states provision is made by statute for the issuance and levy of the writ of attachment on holidays, in certain specified cases.

§ 214. **Attachment—Levy before service of summons.** Although the writ of attachment may not be issued before the summons, it may be served before the summons is served. The service of the summons cuts no figure in the attachment. The attachment cannot, but the summons may, be served by a private person.

§ 215. **No notice to defendant necessary.** The sheriff to whom the writ is directed and delivered must execute the same without delay if the statutory

undertaking be not given. The officer is not bound to look up the defendant to ascertain if he wishes to give the undertaking, nor would it be proper for him to delay executing the writ for that purpose.

§ 216. **What may be levied upon.** The statutory provisions in regard to attachment are broad enough to allow the levy of the writ, and provide a method of levying the writ, upon any property of the defendant, either real or personal, or any interest therein not exempt from execution, or so much thereof as may be necessary to satisfy the demand sued on. Were this not the case, the writ would fall short of its plain object and purpose.

No property may be taken in attachment, however, that is not liable to seizure under the execution when issued, and the only way in which the levying of the attachment upon the property operates as security for the satisfaction of the anticipated judgment is by its capacity to hold the property to await the execution to be issued. This is necessarily implied by the various statutory provisions for the sale of the attached property in case of judgment subsequently recovered. (*California. Code Civ. Proc., sec. 550.*)

§ 217. **When property not attachable.** An attaching creditor can acquire no greater right in the attached property than the defendant had at the time of the levy. If it be so situated that he cannot dispose of it adversely to others, it cannot be attached for his debt. (*Ward v. Waterman*, 85 Cal. 488, 24 Pac. 930; *Lowenberg v. Greenebaum*, 99 Cal. 165, 37 Am. St. Rep. 42, 33 Pac. 794, 21 L. R. A. 399.)

§ 218. **Property in custody of the law.** In the absence of a statute to the contrary, money in the hands of the sheriff, collected on execution, is in the custody of the law, and is not the subject of attachment or garnishment; and money in the hands of a receiver is not liable to seizure without an order from the court having charge thereof. (*Clymer v. Willis*, 3 Cal. 363, 58 Am. Dec. 414; *County of Yuba v. Adams*, 7 Cal. 35.)

§ 219. **Attachment lien — How enforced.** The only mode provided by statute for enforcement of the attachment lien upon property held under the writ is by sale under execution, and payment of the proceeds of the sale and of all moneys derived from sale of perishable property and collected on garnishment. The proceeds of attached property sold under order of court by statutory authority forms no exception to the usual course of proceedings respecting property held under attachment, for the money in the officer's hands, though not required to be levied upon under execution, because not required to be sold, can be applied to the satisfaction of the judgment only when the plaintiff is entitled to an execution, and it is appropriated in the same manner as when made under the execution.

§ 220. **Attachment not affected by new summons.** In *Seaver v. Fitzgerald*, 23 Cal. 86, in a suit commenced before a justice of the peace, it was held that if the summons be returned by the officer with his indorsement thereon that no service has been made, because defendant cannot be found, and on the return day thereof it is further made to appear

by affidavit that the defendant conceals himself to avoid service of process, the suit does not thereby abate, but the magistrate may continue the case, issue a new summons, and make an order for its service by publication. In such case, when an attachment is regularly issued by the justice at the time of the issuance of the first summons, the attachment is not vitiated by the failure to serve the first summons and the issuance of a second one, nor is the validity of the attachment in any way affected by the proceedings. The plaintiff contended that the second summons was *the* summons in the case, because that was the summons served by publication, and as the writ of attachment was issued before this second summons, it was therefore void. The court held that this point was clearly untenable, that a summons was duly issued before or at the time of the issuing of the attachment, and the attachment was therefore valid when it issued. The fact that the defendant absented himself so that the summons could not be served on him before the return day thereof, and that it was returned not served, could not have the effect of vitiating the attachment.

§ 221. **Conflicting attachments.** The application of an attaching creditor to compel the sheriff to pay over the proceeds of goods attached, there being conflicting claims between several attaching creditors, may be made by motion. If notice of the motion is not given by the party moving to the other attaching creditors, it is the duty of the sheriff to do so, if he wishes the decision to bind them. (*Dixey v. Pollock*, 8 Cal. 570.)

A sheriff who receives an attachment regular upon its face, cannot pay over the money obtained by him from the sale of the property, levied on by virtue of the writ, to a junior attaching creditor, because the complaint in the action on which the first attachment was issued did not set forth a cause of action upon which an attachment could issue. When a sheriff receives money on execution sale of property levied on by virtue of attachments, it is his duty to apply the money in the order of the attachments. The sheriff has no right to go back of the process and raise the question as to the validity of the attachments. (*McComb v. Reed*, 28 Cal. 281, 87 Am. Dec. 115.)

If two attachments, issued from different courts, are placed in the sheriff's hands, and one is issued and levied before the other, and the sheriff levies on the same personal property by virtue of both, although the court from which the second attachment issued may make an order for the sale of the property, it has no power to dispose of the fund arising from the sale, other than the surplus remaining after the claim of the first attaching creditor is satisfied. In such case, if the sheriff obeys, and the money is paid to the second attaching creditor, the sheriff is liable to the first attaching creditor for the amount for which he recovers judgment, or for the amount of the proceeds, if less than the amount of the judgment. (*Weaver v. Wood*, 49 Cal. 297.)

Where a first attachment against an insolvent is set aside as fraudulent, in a suit brought by a subsequent attaching creditor, to which various other attaching creditors, prior and subsequent, are parties, the plaintiff in the suit cannot claim priority over the

attachments preceding his, on the ground that by his superior diligence the fraud has been discovered. Such a fund is not strictly an equitable asset. The prior attachments became liens, in the nature of a legal estate vested in the sheriff for the benefit of the creditors. Plaintiff's costs, disbursements, and counsel fees, however, should first be deducted from the fund before distribution. (*Patrick v. Montader*, 13 Cal. 435.)

§ 222. **Priority of the levy—Sheriff and deputy.** Where one writ of attachment was placed in the sheriff's hands on Sunday, and another against the same defendant was placed in the hands of a deputy at a quarter past twelve on Monday morning, the sheriff not knowing the fact, and the first levy was made under the last writ at one o'clock Monday morning, the sheriff was not guilty of negligence in executing the first writ—no special circumstances being shown. (*Whitney v. Butterfield*, 13 Cal. 336, 73 Am. Dec. 584.)

§ 223. **Inventory and return of the writ.** In California the statute requires the sheriff to make a "full inventory" of the property attached and return the same with the writ. (*Code Civ. Proc.*, secs. 546, 559.) He must return the writ of attachment with the summons, if issued at the same time, otherwise, within twenty days after its receipt.

In computing the time, the day of its receipt is excluded and the last day included. The writ of attachment must not be returned until the last day, except by written instruction from the plaintiff or his attorney, or unless it has been fully satisfied. After

having made a levy under the writ, the plaintiff may find other property which he desires to be attached, and if the writ has been returned, he may lose the opportunity to secure such other property, and the sheriff be held accountable therefor. (*California. Code Civ. Proc., secs. 546, 559.*)

§ 224. **What the return should contain.** The sheriff's return upon process is a report of his proceedings thereunder. Where the language of the law, which requires him to do certain things in the service of process, is mandatory, he should make the wording of his return conform strictly to the requirements therein expressed, if he has faithfully followed those requirements in making the service. It is the duty of the sheriff, when returning an attachment of real property, to indorse thereon what acts he performed in serving the writ, and it will be presumed that he states all that he did towards making the service. Care should be taken to include the inventory of attached property, mentioned in the preceding section. If he serve a garnishment upon A, who fails, neglects, and refuses to answer, and, subsequently, by direction of the plaintiff, he serve another garnishment upon A, who answers thereto that he has, or has not, money or goods belonging to the defendant, the officer must make return of both services. He must not take for granted that because no answer was made by A to the first garnishment, it was a useless service, and that therefore no return need be made of that service, for it may be necessary for the plaintiff to show in subsequent proceedings that a copy of the writ and notice of garnishment had been served upon A at the time the first service was made.

§ 225. **Return—When not amendable..** A sheriff has no right, after making a return, to amend it so as to affect rights which have already vested. (*Newhall v. Provost*, 6 Cal. 85.) The return on attachment cannot be amended so as to postpone the rights of creditors attaching subsequently, but before the correction. (*Webster v. Haworth*, 8 Cal. 21, 68 Am. Dec. 287; *Newhall v. Provost*, 6 Cal. 85.)

§ 226. **Return on second writ.** When an officer, by virtue of a second attachment, levies on property already in his possession by virtue of a former attachment, it is only necessary for him to return that he has attached the interest of the defendant in the property then in his possession. (*O'Connor v. Blake*, 29 Cal. 313.) While such a return may be only necessary, it would be proper and more satisfactory to parties interested who desire information regarding the officer's proceedings, to state in the return that the property was attached subject to levy under certain prior writs. The plaintiff should be enabled to ascertain, from the return on file in the clerk's office, what advantages he has gained under the writ; and where a return only states a portion of the officer's proceedings, it is liable to mislead.

§ 227. **Preferred labor claims.** "In cases of executions, attachments, and writs of a similar nature, issued against any person, except for claims for labor done, any miners, mechanics, salesmen, servants, clerks, and laborers, who have claims against the defendant for labor done, may give notice of their claims, and the amount thereof, sworn to by the person making the claim, to the creditor and the officer

executing either of such writs, at any time before the actual sale of property levied on; and, unless such claim is disputed by the debtor or a creditor, such officer must pay to such person, out of the proceeds of the sale, the amount each is entitled to receive for services rendered within the sixty days next preceding the levy of the writ, not exceeding one hundred dollars. If any or all of the claims so presented, and claiming preference under this section, are disputed by either the debtor or a creditor, the person presenting the same must commence an action within ten days for the recovery thereof, and must prosecute his action with due diligence, or be forever barred from any claim of priority of payment thereof; and the officer shall retain possession of so much of the proceeds of the sale as may be necessary to satisfy such claim until the determination of such action; and in case judgment be had for the claim, or any part thereof, carrying costs, the costs taxable therein shall likewise be a preferred claim with the same rank as the original claim." (*California. Code Civ. Proc., sec. 1206.*)

"The debtor or creditor intending to dispute a claim presented under the provisions of the last section (section 1206) shall, within ten days after receiving notice of such claim, serve upon the claimant and the officer executing the writ, a statement in writing, verified by the oath of the debtor, or the person disputing such claim, setting forth that no part of said claim, or not exceeding a sum specified, is justly due from the debtor to the claimant for services rendered within the sixty days next preceding the levy of the writ. If the claimant bring suit on a claim which is disputed in part only, and

fail to recover a sum exceeding that which was admitted to be due, he shall not recover costs, but costs shall be adjudged against him." (*California. Code Civ. Proc., sec. 1207.*)

The constitutionality of section 1206 of the Code of Civil Procedure, which provides for giving preference to labor claims out of moneys received on execution, is affirmed by the supreme court, in the case of *Mohle v. Tschirch*, 63 Cal. 381.

§ 228. **Service of notice.** It has been held that the service of the notice required by section 1206 of the California Code of Civil Procedure, *ante*, may be made upon the attorney for the attaching creditor. (*Carter v. Green Mountain G. M. Co.*, 83 Cal. 222, 23 Pac. 317.)

CHAPTER X.

ATTACHMENT OF PERSONAL PROPERTY.

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§ 230. **Attachment of personal property.** The manner of making levy of the writ upon personal property is prescribed in subdivisions 3, 4, and 5 of section 542 of the Code of Civil Procedure, and is as follows:—

“3. Personal property, capable of manual delivery, must be attached by taking it into custody.

“4. Stocks or shares, or interest in stocks or shares, of any corporation or company, must be attached by leaving with the president or other head of the same, or the secretary, cashier or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached, in pursuance of such writ.

“5. Debts and credits, and other personal property, not capable of manual delivery, must be attached by leaving with the person owing such debts, or having in his possession or under his control such credits and other personal property, or with his agent, a copy of the writ and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ, except in the case of attachment of growing crops, a copy of the writ, together with a description of the property attached, and a notice that it is attached, shall be recorded the same as in the attachment of real property.” (*See, also, sec. 264, post, as to “Garnishment.”*)

§ 231. **Attachment of vessels.** In California the code makes special provisions for attachment and sale of steamers, vessels, and boats. (*Code Civ. Proc., secs. 813-827.*) "The writ must be directed to the sheriff of the county within which the steamer, vessel or boat lies, and direct him to attach such steamer, vessel or boat, with its tackle, apparel and furniture, and keep the same in his custody until discharged in due course of law. The sheriff . . . must execute the writ without delay, and must attach and keep in his custody the steamer, vessel or boat named therein, with its tackle, apparel and furniture; . . . but the sheriff is not authorized by any such writ to interfere with the discharge of any merchandise on board of such vessel, or with the removal of any trunks or other property of passengers, or of the captain, mate, seamen, steward, cook or other person employed on board." The attachment may be released upon the usual undertaking, if there are no claims for wages against the vessel. (*Code Civ. Proc., secs. 818-823.*)

§ 232. **Statutory procedure exclusive.** When a method of procedure is laid down by statute for the bringing of suits, levy of attachments and executions against vessels, it would appear that such procedure is exclusive of all provisions of the general law conflicting therewith; but that all provisions of the general law not conflicting are operative. This is in line with the settled rules of construction. (*California. See Code Civ. Proc., secs. 4482-4484.*)

§ 233. **Building as personal property.** When a house is personal property, it is personal property

capable of manual delivery, and must be attached as such.

§ 234. **Necessity of prompt action.** As personal property, capable of manual delivery, must be attached by taking it into custody, so no unnecessary time should be lost in executing the writ. It not infrequently happens that the defendant in the action has become suspicious that proceedings are about to be taken against his property, and that to avoid the anticipated seizure he is seeking to transfer his effects. In such cases moments of time lost represent property fleeting as with wings, and the creditor is thus momentarily in danger of losing his debt. The object of the writ is to enable him to secure his claim, if it be a just one, and the law places the services of the officer at his command to accomplish that purpose. After carefully inspecting the writ to assure himself that it is in due form, and complying with the legal requirements relating to his fees for service, the officer must indorse upon the writ the time of its reception. He should proceed at once to the place indicated to him as the location of the property and take it into custody, unless the defendant give him the statutory undertaking to prevent the attachment. (*See, also, sec. 31, ante.*)

§ 235. **Liability for delay.** In proceeding to make a levy upon personal property, if the defendant express a wish to give the statutory undertaking to prevent or to release the attachment, the officer may exercise his judgment as to whether he can safely abstain from levying until the defendant shall have had sufficient time to get his sureties and execute the

undertaking. In deferring a levy, however, the officer does so at his own risk. The property is within his reach, and he becomes responsible to the plaintiff for whatever loss may be sustained by reason of his neglect.

§ 235a. **Claim by third party.** The numerous suits to be found in the court records against sheriffs and constables would seem to indicate that the greatest risks incurred by these officers in civil cases lie in the taking of property under writs of attachment and execution. Where the property belongs to the defendant, and there is no controversy concerning its ownership, the path of duty is smooth and clear. The officer has only to follow the course pointed out by the law to a satisfactory conclusion. But when the property levied upon is claimed by a stranger to the writ, the officer's responsibility begins. When the creditor appeals to the courts for aid in the collection of his account, the debtor, as a general rule, either succumbs to the inevitable force of circumstances or assumes an attitude of hostility. If he submits to a seizure and sale of his effects, in acknowledgment of the justness of the creditor's claim, the officer's course is simple and easily performed. If, on the other hand, the debtor choose to throw obstacles in the creditor's way, the officer finds himself beset with difficulties and dangers. Transfers of personal property are easily effected, and, under the pressure of legal proceedings, the whilom successful merchant, contractor or what not, has suddenly become insolvent. If the transfer has been legally made, the creditor has no redress. If the requirements of the law have not been complied

with, concerning the delivery and possession of the property, the creditor may cause it to be seized under legal process and made to answer for the debt. Although the debtor may have actually sold his property, received the purchase money for it, and given written evidence to the purchaser of the sale, yet in some states the sale will not stand before the law if there has not been an actual delivery of the property and a continued possession thereof in the purchaser. (*See chapter on "Fraudulent Transfers,"* sec. 691, *post.*) Relying upon his legal rights, which so closely adapt themselves to his moral rights in the matter, the creditor pursues the property and claims his remedy in it. The sooner, then, that the officer who has levied upon the property secures an indemnity bond with sureties upon whom he can rely for the payment of any judgment that may be rendered against him in favor of the claimant, the easier will be the burden of his duties thereon.

§ 235b. **Right of officer to indemnity.** When an attachment or execution is placed in the hands of an officer to be executed, he may demand indemnity of the plaintiff in the execution before he can be required to seize property in possession of third parties claiming to be the owners, and if the plaintiff, upon demand, fails to indemnify the officer, and he thereupon returns the writ *nulla bona*, an action for false return cannot be maintained, even if it should turn out that the goods so found in the hands of strangers claiming to own them, were the goods of the defendant in the writ. This declaration appears in the opinion of the court in the case of *Long v. Neville*, 36 Cal. 459, 95 Am. Dec. 199, but it is

qualified by the further statement that "where statutes exist providing for calling a sheriff's jury preliminary to demanding indemnity, it may be necessary to call a jury before demanding the indemnity, unless the calling of a jury be waived." An officer called upon to serve a precept, either by attaching property or arresting the person, if there be any reasonable grounds to doubt his authority to act in the particular case, has a right to ask for an indemnity.

He is not obliged to serve process in civil actions at his own peril, when the plaintiff in the suit is present, and may take the responsibility upon himself.

The risk he is required to run is not for himself, but for the benefit of the attaching creditor. If the goods, moreover, as the creditor alleges, are the property of his debtor beyond dispute, he, the creditor, cannot be injured by giving the indemnity, and if they are not, it is right that he who, for his own supposed advantage, insists on the seizure, should take the consequences of the act.

If the property be claimed by a written claim, verified by the oath of the claimant or that of his agent, setting out his right to possession, the sheriff is not bound to keep the property unless the person in whose favor the writ runs, on demand, indemnify the sheriff against such claim by "an undertaking by at least two good and sufficient sureties." (*California. Code Civ. Proc., sec. 689; Stats. 1907, p. 683.*)

§ 236. What acts of officer are justified under writ. The writ commands the officer to attach and

safely keep all the property of the defendant within the county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, unless the defendant gives the statutory undertaking for release. If the property to be attached is in a store, he may seize and take away sufficient of the stock of goods to meet the requirements of the writ. He may attach money in a drawer or safe or wherever found, but he cannot take property from the person of the defendant, except it be money or other valuables in a bag or package in the hand of the defendant. He may not break open the outer door or window of a dwelling-house to make a levy, nor gain admission thereto by even lifting the latch of an outer door. But if, after gaining peaceable and lawful admission to the house, there is property of the defendant therein, he may take it, even if he be compelled to break the inner doors of the house to reach it. If property to be attached is in a building other than a dwelling, he may use whatever force may be necessary to enable him to serve the writ, but he must first announce his office and business and make demand for admission. If resistance is made to the service, he may call to his aid whatever assistance is needful. But he should not go away from the place where the property is situated to procure aid, if he can avoid doing so, for he will do so at the risk of losing the goods during his absence.

Personal property is not attached until it is within the view of the officer. The mere formality of standing at an outer door of a building in which goods are situated, and placing guards or keepers around the building does not constitute a levy. (*Taffts v. Manlove*, 14 Cal. 47, 73 Am. Dec. 610; sec. 244, *post.*)

The extent to which an officer may proceed in the use of force, in the breaking into a building to levy upon the goods of a debtor, has not been determined by any supreme court decisions of this state. Although a man's dwelling is by law deemed to be his castle and sacred from intrusion, it is not so with his warehouse, store, or place of business. It has been definitely settled in many of the older states whose laws are similar to those of California that an officer cannot break open the outer door of the defendant's dwelling, nor even lift the latch thereof to gain admission, to seize the defendant's property. After having gained peaceable entrance, however, he may break the inner doors, closets, drawers, boxes, chests, or trunks, to seize property. In all cases where force may be used, the officer should first demand admission. The outer door of the defendant's store or other place of business may be broken open by an officer to enable him to make a levy, but all undue violence should be avoided when possible.

§ 237. **What acts necessary in making levy.** As the writ is only effectual from the time a valid and legal levy of the process has been completed, the question often arises, What constitutes a levy, valid and sufficient in law to vest the property? In *Taffts v. Manlove*, 14 Cal. 47, 73 Am. Dec. 610, the court say:—

“It may be admitted, as unquestionably the law is, that a levy may be good as against the defendant in the writ, when it would not be good as to third persons. But we apprehend that this distinction is not based upon any difference in the legal requisites of

a levy, but in fact that the conduct of the defendant, either by positive or negative acts, may amount to a waiver, or an estoppel, or agreement that *that* shall be a levy which, without such conduct, would not be sufficient. However this may be, we can conceive of no principle of law, and have been referred to no case, which holds that the acts relied on by appellant constitute a levy. Waiving everything else, the essential element of an intention to levy prior to the entry seems to be wholly wanting, from anything we can see in the agreed statement. That the sheriff came to the house in order to make the levy is very certain; but that he intended to make, or considered he *had* made, a levy on goods in the house, by standing at one door and putting his companion at the other, does not appear. He made then no note or memorandum of the levy—did not, perhaps, even know what goods were in the store, their description or value; and besides this, demanded the key afterward and entered, and *then* seized the goods, took the inventory, and indorsed the levy. There is neither proof nor probability that, before this time, he considered he had seized the goods, or if he did, we think he was clearly mistaken.

“In Crocker on Sheriffs (sec. 425, p. 172) it is said: ‘A levy upon personal property is the act of taking possession of, seizing or attaching it by the sheriff or other officer,’ etc. It is true, the author, in section 427, says: ‘As against the defendant in execution, no great strictness of form will be necessary in making a levy upon personal property. Thus the mere entering by the sheriff of the property of the defendant, with his assent, upon the execution, will be conclusive upon such defendant, though the prop-

erty is not present, and the officer does not *know* where it is.' But this authority and the cases cited by appellant's counsel are far from proving the proposition they labor to sustain. It is not necessary to review these cases, for all of them turn upon a wholly different principle from that invoked. The principle, namely, that the assent of the defendant is sufficient as against him, even where the goods are not within view, or subject to the dominion of the officer.

"But it cannot be necessary to pursue this inquiry. It is too plain for argument that there can be no levy when the officer does not even know the subject of the levy. As well might a sheriff stand in the street and levy upon the contents of a banking-house, as to stand in a store door at midnight, and claim that merely by standing there and preventing any person from coming into the store, he had levied on the contents, whatever they were, of the store, and this without having any knowledge of the nature of the stock, much less of the particular description or value. But, as we said before, nothing appears to show that the mere watching and guarding of the storehouse was meant to be a levy on the property inside; but these were acts merely in prosecution of the design to enter the house and levy on the property there, which purpose was afterwards accomplished." (*See, also, secs. 238, 239, post.*)

§ 238. **What constitutes taking into custody.** If a sheriff attaches personal property consisting of a portable steam threshing-engine and accompanying articles used for threshing, by making a memorandum of the property and delivering a copy of the

attachment, summons, and complaint to the defendant, and then directing verbally a person who is at work one hundred yards from the place where the property lies, to look after it, and if any one meddles with it to tell them it is attached, he has sufficient custody of the property as against persons purchasing it from the defendant with knowledge of the attachment. (*Rogers v. Gilmore*, 51 Cal. 310.) In deciding this case the court said:—

“The statute requires that the officer should take the property into custody. And it seems by the authorities that what that means is governed somewhat by the situation or relation of the parties making the contest. It is supposed that as against Gilmore himself there was sufficient custody of this property to hold it. Against another attaching creditor there may not have been. Against a purchaser from Gilmore, *in good faith*, there may not have been. But the court is of the opinion that the defendants purchasing from him *with notice* of the attachment, it is a sufficient custody as against them.” (*See, also, secs. 237, ante, 239, post.*)

§ 239. **Property must be within view of officer.** The levy to be valid must be made by taking the goods into his custody and under his exclusive control. The articles must be within the power of the officer. He must continue to retain this power over them by remaining present himself, by appointing an agent or keeper in his absence, by taking a receipt for the property, by inventorying them, or by a reasonable removal of them. It is not necessary that they should be removed, but they must in all cases be put out of the control of the debtor. When the

attachment is levied, the property must be within the view and subject to the control of the officer. (*See, also, secs. 236, 237 ante.*)

§ 240. **Void levy—Instances.** A levy made by a constable on goods which he does not see or have in his possession is void. (*Herron v. Hughes*, 25 Cal. 556.) A levy brought about by unlawfully bringing property from one jurisdiction into another for that purpose is held to be utterly void.

§ 241. **Property must be kept in custody.** When the statute requires the officer to levy upon personal property by taking it into custody, the officer cannot safely leave it in the possession of the defendant after making the levy. The principle is laid down in *Duterte v. Driard*, 7 Cal. 549, and *Sanford v. Boring*, 12 Cal. 539, that if, after a levy of a writ of attachment upon personal property, by taking it into possession, the officer permit the defendant in attachment to resume its possession, the levy would be thereby defeated as against execution or attachment creditors subsequently levying thereon, or against a subsequent purchaser from the defendant in attachment, who, upon such purchase, takes the possession thereof.

§ 242. **Sheriff responsible for the property levied upon.** A sheriff who levies a writ of attachment upon personal property, in obedience to the commands of the writ, has no right to let the property go out of his hands, except in due course of law, and if he does, and the debt is lost, he is responsible to the plaintiff in the attachment for the amount of

the debt. In the case of *Sanford v. Boring*, the defendant was sued as sheriff for a failure to make a levy and sale of property, previously attached in the same suit, under an execution issued upon a judgment in favor of plaintiff and against Pultney & Armstrong. When the sheriff took the property under the writ of attachment he did not remove it, but left it all in the stable where it was attached, and in the possession of Armstrong, one of the then defendants, who continued in possession and conducted the business as he had done before. The sheriff did not make the money, owing to a subsequent levy and sale of the property under execution against the same parties. In deciding the case adversely to the officer, the supreme court says:—

“The levy of the attachment placed the property in the hands of the sheriff to abide the judgment and execution, and this property was the plaintiff’s security for his debt. If the sheriff wasted or lost it, or suffered it to be diverted to some other purpose, he is liable. He had no right to suffer the property to go out of his possession, except in due course of law, and is responsible if he did.” (*Sanford v. Boring*, 12 Cal. 539.)

§ 243. **Removal of attached property.** When goods are attached in a store, dwelling, hotel, or other establishment, and the defendant shows no inclination to procure a release of the attachment, or, on the contrary, desires the property removed, and that no keeper be left upon his premises, the wishes of the owner should be complied with as soon as practicable. How soon must depend upon the circumstances of the case. For while it is not only the right

but the duty of the officer to seize the creditor's property, yet the creditor's house is his castle, and the officer by remaining therein, or by leaving his keeper therein, an unreasonable length of time, becomes a trespasser and may be ejected therefrom. He is not bound to remove the goods in the night-time, when the levy has been made at too late an hour of that day to enable him to take them away with safety.

§ 244. **Ponderous articles.** The delivery of ponderous articles may be symbolical; and where goods are locked up a delivery of the key is so far a delivery of the goods that it will support an action of trespass against subsequent purchasers or attaching creditors who take possession of them. (*Adlard v. Rodjers*, 105 Cal. 327, 38 Pac. 889.)

§ 245. **Excessive levy.** If there is sufficient property in the defendant's possession to satisfy the claim of the attaching creditor, with costs, he will be liable to the latter if he does not levy upon sufficient goods to satisfy the judgment. If, on the other hand, he make an excessive levy, he is liable to the defendant in the action. Where there is great uncertainty at the time of the levy as to the value of the property attached, and it is subsequently ascertained that its value is greatly in excess of the demand sued for, it does not follow that the levy was therefore excessive. It is the duty of the officer to seize sufficient property to satisfy the amount specified in the writ—that is to say, property which would be sufficient, in his judgment, when sold at public auction. There are times when from the situation of the property, and other circumstances, there must be great uncertainty

as to its value, and because it may turn out afterwards that the value of the property is much greater than the demand, it does not follow that the levy was therefore excessive. (*Sexey v. Adkison*, 40 Cal. 408.)

§ 246. **Authority to conduct business under attachment.** An attorney has no authority, by virtue of his employment as such, to instruct a sheriff to conduct a business, such as a restaurant, upon which an attachment has been levied, and thereby bind his client for the expenses incurred. This is laid down as the law in California in *Alexander v. Denaveaux*, 53 Cal. 663, 59 Cal. 479, and is in accordance with section 283 of the Code of Civil Procedure of California, which in subdivision 1 defines the authority of an attorney: "To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, *and not otherwise.*" There are decisions to the contrary in other states, but they are probably based upon less stringent laws relating to clientage.

§ 247. **As to residence and business premises combined.** A building may be occupied partly as a dwelling and partly for business purposes, as where the occupant conducts a store for the sale of merchandise in a room fitted up for that purpose, and resides with his family in other parts of the building. In such cases the whole building is not regarded as a dwelling; and even though the two parts are approached through a common door, this door may be broken for the purpose of seizing goods in the store. If, however, the building or room is used as a dwelling, the owner's right to shelter himself and his goods

therein from civil process, in the part used as such dwelling, is not forfeited by his also using it for business purposes. Hence a levy effected by breaking into a building consisting of one room, in which the defendant resided and also carried on her business as a milliner, was adjudged to be a trespass, and the officer was not permitted, in mitigation of damages, to prove that the goods levied upon had been sold, and the proceeds applied to the satisfaction of a judgment against the defendant. (*Freeman on Executions*, 256.)

§ 248. **Allowing defendant to conduct business.** The fact that a stock of goods in a store is attached is not positive evidence that the defendant is insolvent and unable to pay the claim. Where the officer knows the debtor to be solvent, he may be morally, although not legally, justified in permitting the debtor's business to go on for a brief time, to enable him to settle with the attaching creditor, the officer in the mean time placing a keeper in charge of the goods, with the understanding that all moneys received by sales shall be turned over to the officer. When the officer makes this concession to the defendant, he of course does it upon his own responsibility, and is liable for any loss to the attaching creditor which may result therefrom. (*See, also, sec. 246 ante.*)

§ 249. **Officer's lien dependent on possession.** An officer who levies an attachment or execution upon personal property acquires a special lien, dependent on possession, upon such property, which authorizes him to hold it until the process is discharged or satisfied, or a judicial sale of the property is had. (*California. Civ. Code, sec. 3057.*)

§ 250. **Attachment of partnership property.** A sheriff, under an attachment, must take possession of the personal property upon which he levies. Being authorized to seize the interest of one of several part owners in a chattel, he must take the sole possession of it, in order that it may be forthcoming at the day of sale. If a sheriff has a writ of attachment against one member of a partnership, he must attach the interest of that partner in the partnership effects, and in order to do so may take possession of the entire property. (*Clark v. Cushing*, 52 Cal. 617.)

This subject is discussed at length in the chapter on "Executions against Personal Property" (*secs.* 372-394 *post*), where several authorities are cited, the rule being the same in case of attachment as on levy of execution, and also the same in case of tenancy in common in chattels.

§ 251. **Sheriff's keeper—Suggestions.** In the attachment of personal property the officer is responsible for its value from the moment the attachment is levied. If the plaintiff recover judgment, he will look to the officer for the value of the goods levied upon, or sufficient thereof to satisfy his judgment.

Hence it will be seen that the preservation of the property is of the utmost importance. If the property, or any portion of it, be not forthcoming at the proper time, the officer must make the loss good. When a keeper is required, the officer should select the person who is to take care of the property. Neither the plaintiff nor the defendant may dictate to the officer as to who shall take charge of the goods. The writ commands him to "attach and safely keep the property." He should make the expense of keep-

ing it as light as possible consistent with its safe keeping.

Where a mutual friend of the attaching creditor and debtor offers to act as keeper without pay, and the offer is accepted, a stipulation to that effect should be given to the officer, in writing, signed by the creditor and debtor and the keeper. Experience, however, teaches that such a concession is often productive of annoyance and loss. The person thus acting as keeper is likely to consider himself less the trusted agent of the officer than the obliging friend of one or the other of the litigants. In such cases circumstances are liable to arise wherein he cannot faithfully serve two masters—the litigant on the one hand and the officer on the other. Such a course may sometimes be followed with safety, when there is but one attachment on the property. But if a second writ is placed in the hands of the officer, the officer becomes also liable to the second attaching creditor, and should assume such control over the goods as could not be questioned.

In one case a sheriff attached the contents of a livery stable, and, by request of the attaching creditor and debtor, placed a mutual friend in charge as keeper, who, by verbal agreement, was to serve without pay. Some days afterwards the plaintiff notified the sheriff that the suit had been settled. The officer returned the writ in due time and dismissed the affair from his mind. In the mean time the stable had changed hands, and in the course of some months later the defendant brought an action against the officer for the return of the property attached or the value thereof. The officer found to his cost that he had been dealing with unscrupulous per-

sons, and had a narrow escape from paying a heavy pecuniary penalty for his laxity in dealing with them in the earlier proceedings.

§ 252. **Expense of keeping property.** In keeping property under process, the same prudence and economy should be exercised as in the ordinary business affairs of life. No unnecessary expense should be incurred therein. Where the fee bill of the county provides that the costs of the officer shall be allowed by the court, a statement of the costs should be submitted to the court for approval before the return is made upon the writ.

A deputy sheriff who seizes property under an attachment is not authorized, by virtue of his office, to bind the sheriff by contract for the payment of a keeper to take charge of the property so attached. Special authority for this purpose must be shown. (*Krum v. King*, 12 Cal. 412.)

§ 253. **Consideration to be shown defendant.** In making the seizure, the officer should exhibit as much regard for the position of the defendant as he can consistently with the duty he owes to the law, the creditor's rights, and to himself. He should under no circumstance conduct himself tyrannically toward the debtor, nor proclaim the debtor's misfortune from the house-top. Yet, to constitute a valid levy, the courts have held that some open, unequivocal act should be done that would lead all persons to know that the property was no longer in the custody of its former owner, but in that of the law. The levy of the attachment should be announced to whoever may be present in charge of the property, and

if it is necessary for the safe keeping of the property, a keeper should be put in charge thereof.

§ 254. **What may be levied upon.** Plaintiff was walking along the street with a bag of gold coin in his hand. Two of defendants, a deputy sheriff and a constable, seized him and by force took the bag of coin from him. The court held (*Green v. Palmer*, 15 Cal. 412), that from its seizure thus situated, the plaintiff could not claim any exemption, as he might perhaps do in reference to money upon his person. Thus situated, it was like a horse held by its bridle, subject to seizure under execution against its owner.

As indicating an instance wherein money in the hands of a bailee may be attached, the case of *Chandler v. Booth*, 11 Cal. 342, is cited, where A, who carried on a printing-office and was indebted to the hands of the office, placed in the hands of B a certain amount of money, with directions to B to pay the hands, which B neglected to do, and where there was no evidence showing that the hands agreed to look to B for their money, or that A was indebted to the hands in an amount equal or approximate to the sum in B's hands, and the money was subsequently attached in the hands of B at the suit of C against A, it was held that the money was liable to the attachment.

The sheriff cannot attach money collected on execution in his own hands. If at any time such money is subject to other process in his hands, such process must be executed by the coroner. Money in the hands of the sheriff, collected on execution, is not a debt due to the plaintiff in the execution, but is in the custody of the law until properly disposed of,

and is not the subject of attachment or garnishment. (*Clymer v. Willis*, 3 Cal. 363.)

The indebtedness of the maker upon a promissory note before its maturity is not the subject of attachment. His obligation is not to the payee named in the note, but to the holder, whoever he may be. Nor can such indebtedness, after the maturity of the note, be attached, unless the note is at the time in the possession of the defendant, from whom its delivery can be enforced on its payment upon the attachment. (*Gregory v. Higgins*, 10 Cal. 339.)

Property in the custody of the law, or in the hands of a receiver appointed by a competent court, is not liable to seizure without an order from the court having charge thereof. (*Yuba County v. Adams & Co.*, 7 Cal. 35; *Adams v. Haskell*, 6 Cal. 113, 65 Am. Dec. 491.)

Funds in the hands of a receiver, in a suit for dissolution of a partnership, are subject to attachment at any time before a final decree of dissolution and distribution. (*Adams v. Woods*, 9 Cal. 24. See, also, sec. 216, ante.)

§ 260. **Cannot levy on valueless property.** Ill-feeling engendered by a refusal of a debtor to pay his honest debts sometimes prompts a creditor to levy upon valueless property for the purpose of annoying the unfortunate delinquent and to injure his business. In illustration: A levy upon a few hundred copies of a newspaper as they come from the press would not satisfy the costs of levy and sale thereof, and would not be justifiable. A levy can be justified only on the ground that it may contribute to the payment of the judgment, and not merely to the mental satisfaction of the judgment creditor.

§ 261. **Levy on account-books and valueless papers.** The authorities uniformly hold that where property is of such a nature that an attachment of it would produce a sacrifice and great injury to the defendant, without benefiting the plaintiff, it is not attachable. Such is the rule in relation to the defendant's private papers, or his books in which his accounts are kept. Much less would an attachment be considered to create a lien on the accounts contained in the books. (*Drake on Attachments*, 6th ed., sec. 249, and citing *Bradford v. Gillespie*, 8 Dana, 67.)

Books of account and trial balances are not property of such tangible character that they can be made subject to such levies. They may be evidences of debt, but their seizure is not the attaching or seizure of the debt itself. They are not so intimately connected with the demands charged therein that the seizure of the books is equivalent to the seizure of the demands, and there is no means by which these demands can be transferred by a direct levy and sale. (*Freeman on Executions*, sec. 112; *Commonwealth v. Abell*, 6 J. J. Marsh, 476; *Thomas v. Thomas*, 2 A. K. Marsh, 430; *Wier v. Davis*, 4 Ala. 442; *Carlos v. Ansley*, 8 Ala. 900; *Horton v. Smith*, 8 Ala. 73, 42 Am. Dec. 628.) In *Dart v. Woodhouse*, 40 Mich. 399, 29 Am. Rep. 544, Mr. Justice Campbell said: "It would be very absurd to hold that books could be seized and sold on execution which after sale the purchaser could not use."

§ 262. **Excluding from premises the owner of attached property.** The entry upon the premises even of the defendant in execution should be without

any unnecessary invasion or disturbance of his rights. Hence the officer has no right to exclude him from the possession of any part of the premises, or to otherwise take exclusive possession thereof. This rule applies to levy upon goods in a store. They should be removed within a reasonable time, instead of taking possession of the store and excluding the owner therefrom. (*Freeman on Executions*, 256.)

An officer attaching machinery in use at the time by the defendant upon premises leased by him has no right to exclude the defendant from the premises, notwithstanding the lease be also attached. (*Grey v. Sheridan Electric Light Co.*, 19 *Abb. N. C.* (N. Y.) *Sup. Ct.* 152.)

§ 263. **Right of officer to enter business premises.** An officer has the right to enter a business place against the will of the occupant, permission having been asked and refused, and to seize the property therein belonging to the occupant and subject to levy. It is impossible to make such levy in many cases, as where a whole stock of goods is seized, without taking possession of the place where the goods are. The officer must not linger longer than reasonably necessary to carefully pack up and prepare the goods for removal (*Waples on Attachments*, sec. 298); to do this packing may take an hour or it may require a week. (*Ramsey v. Burns*, 27 *Mont.* 711, 69 *Pac.* 711.)

§ 264. **In custody of the law.** Where money has been deposited in the hands of a clerk in lieu of an appeal bond, it is held that it may be attached by garnishment at the suit of a creditor of the depositor.

And where, after satisfying an execution from the proceeds of a sale, the officer has a surplus in his hands, it may be so attached by a creditor of the party to whom it is due; as it cannot be regarded as money in the custody of the law, but as the money of the party to whom it belongs. And so it is held that an accepted draft filed in a case with a clerk may be attached by citing the clerk in whose custody it is, as garnishee, and proving such custody by his answers to interrogatories. So, also, it is held that the sheriff may be charged as garnishee, on account of money collected for the defendant on execution, although the money has never been demanded of him. Where the money in the hands of the officer is subject to the order of either of the parties to the action, and such party has a right of action therefor, or may perfect such right by simply making a demand, no reason is apparent for regarding the money so held as in the custody of the law. And any support that a denial of the right of a creditor of the party so entitled to attach such money receives, must come from the statutes, or *stare decisis*. The statute may be so framed that, without expressly excluding officers from the classes subject to garnishment, a strict interpretation will not include them. But in the absence of any exclusion, either express or implied, or of circumstances that should render the funds in their hands exempt from attachment, on principle they should be required to answer the process of garnishment precisely as any other custodian of the debtor's effects. (*Wade on Attachment, sec. 317.*)

§ 265. **Levy on contents of safe.** When the sheriff levied upon the safe and its contents the safe

was locked, and he was unable at the time to take possession and make an inventory of the contents. The fact did not defeat the levy, however. The contents of the safe, including the notes in suit, were in the possession of the sheriff through his possession of the receptacle in which they were stored. There was a valid lien upon the notes by means of such levy upon the safe and contents. (*Smith v. Clark*, 100 Iowa, 47, 69 N. W. 1011.)

§ 266. **Loss of race-horse.** If a race-horse is wrongfully detained under attachment, the owner may recover damages for his depreciation in value by reason of improper treatment, but he cannot recover as damages entrance fees and fines paid after the horse was attached, for his entry in certain future races in which he was unable to start by reason of the attachment. (*Riley v. Littlefield*, 84 Mich. 22, 47 N. W. 576.)

§ 267. **Certain building materials not attachable.** "Whenever materials shall have been furnished for use in the construction, alteration or repair of any building or other improvement, such materials shall not be subject to attachment, execution or other legal process, to enforce any debt due by the purchaser of such materials, except a debt due for the purchase money thereof, so long as in good faith the same are about to be applied to the construction, alteration, or repair of such building, mining claim, or other improvement." (*California. Code Civ. Proc.*, sec. 1196.)

§ 268. **Property in a foreign receiver's hands.** Personal property in the lawful custody of a foreign

receiver, brought into a state in the course of business, is subject to attachment under its laws by a creditor resident of the state, and the attaching creditor has the superior right. (*Humphreys v. Hopkins*, 81 Cal. 551, 15 Am. St. Rep. 76, 22 Pac. 892, 6 L. R. A. 792.)

§ 269. **Release of attachment.** An attachment as to any real property may be released by a writing signed by the plaintiff or his attorney, or the officer who levied the writ, and acknowledged and recorded in the like manner as a grant of real property; and upon the filing of such release it is the duty of the recorder to note the same on the record of the copy of the writ on file in his office. Such attachment may also be released by an entry in the margin of the record thereof in the county recorder's office in the manner provided for the discharge of mortgages under section twenty-nine hundred and thirty-eight of the Civil Code. (*California. Code Civ. Proc., sec. 560; Stats. 1907, p. 709.*)

§ 270. **Release by judgment for defendant.** "If the defendant recover judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales and money collected by the sheriff, and all property attached remaining in the sheriff's hands, must be delivered to the defendant or his agent." (*California. Code Civ. Proc., sec. 553.*)

In case of a dismissal of an action by a justice of the peace for non-appearance of the plaintiff, the judgment for defendant operates as a dissolution of an attachment, although the justice reinstates the case, and the parties appear and try it. (*O'Connor v. Blake*, 29 Cal. 313.)

§ 271. **Release on undertaking given.** Statutory provision is made for the release of the attachment upon the giving of a bond to be taken by the sheriff. When a sufficient undertaking is taken by him, his duty in the premises is discharged, and he has no further responsibility in the matter. (*Curiac v. Packard*, 29 Cal. 194; also, *Preston v. Hood*, 64 Cal. 405, 1 Pac. 487.)

In going to make a levy upon personal property, the officer will sometimes find it convenient to have with him a blank undertaking to prevent attachment, and also a blank undertaking for the release of an attachment. It is not obligatory upon him to have such blanks with him, but much time and annoyance may sometimes be saved by having them at hand, where the defendant wishes to retain the custody of his property. (*California. Code Civ. Proc.*, sec. 540.)

§ 272. **Form of undertaking.** A common-law bond, in form, upon the prescribed statutory conditions, given to a sheriff to procure a discharge of goods attached, is a sufficient compliance with the provisions of the statute. (*Curiac v. Packard*, 29 Cal. 194.) In this case the court decided that the undertaking, if sufficient, is to be taken by the sheriff when the property *has been* as well as when it is *about to be* attached.

§ 273. **Sureties on bond for release.** If the defendant desires to give the statutory undertaking for release of the attachment, the officer should satisfy himself that the sureties are able to respond to the obligation they assume. He should question the per-

sons who present themselves to him as sureties concerning their proper qualifications, and seek to secure the plaintiff as he would himself.

§ 274. **Money deposited to release the property.** Where the defendant in an action, whose property had been attached by the sheriff, deposited with the sheriff a sum of money in gold coin in lieu of an undertaking to procure a release of the property, and the property was thereupon released, and afterwards, by agreement between the parties to the action, the money was taken from the sheriff and loaned out pending the litigation, and a note drawing interest taken therefor, payable to plaintiff's attorney: *Held*, that after plaintiff recovered judgment, the persons who borrowed the money did not hold it in the character of bailees of the sheriff, but that they were mere debtors, and the money in their hands a mere debt, to be treated as such on proceedings supplementary to execution. (*Hathaway v. Brady*, 26 Cal. 581.) Under such conditions the money ceases to be in the custody of the law.

§ 275. **Release upon plaintiff's order.** The direction to release the attachment should be in writing, signed by the plaintiff or his attorney. There may be circumstances attending a case where such direction should come from the plaintiff's attorney, and not from the plaintiff. The plaintiff may, through ignorance, divest himself of his rights by causing a release to be precipitately made; and hence as a rule it is generally most prudent to look to the attorney for such instructions. In the case of *Perlberg v. Gorham*, 10 Cal. 121, where a partnership existed

between two persons in the purchase of goods, and they subsequently brought suit to recover their value from a trespasser who had seized them, it was held that one partner is competent to execute a release in the name of himself and copartner. But it is not always safe to recognize such a right. In the case of *Perlberg v. Gorham*, 23 Cal. 349, the defendant Gorham as sheriff levied on goods claimed by the plaintiffs. After suit had been brought, one of the attaching creditors procured a release from one of the plaintiffs, executed in the name of both, of all actions, etc.; it was held that if this release was obtained by fraud, it was void, and the sheriff could derive no advantage from it, although he was not implicated in and knew nothing of the fraud.

§ 276. **Proceedings on release.** When an attachment on personal property is released, the property should be returned to the person from whom it was taken. Where the property has been taken from the defendant, it should be returned to him or to his agent, or to such person as the defendant may in writing direct the officer to deliver it to. The officer should take a receipt therefor from the person to whom it is delivered. An officer cannot with safety ignore these seemingly unimportant business formalities.

§ 277. **Death of defendant destroys attachment lien.** If the defendant die after the levy of an attachment upon his property and before judgment, his death destroys the lien of the attachment, and the attached property passes into the hands of the administrator, to be administered on in due course of

administration. (*Myers v. Mott*, 29 Cal. 359, 89 Am. Dec. 49.)

§ 278. **Release by appeal.** After judgment in favor of defendant, the attachment is at once and *ipso facto* discharged, under the express provisions of section 553 of the California Code of Civil Procedure, although an appeal be taken by the plaintiff, on which appeal he ultimately obtains judgment. An attachment, being merely a creature of statute, can continue no longer than the statute provides. (*Loveland v. Alvord C. Q. Min. Co.*, 76 Cal. 562.)

§ 279. **Liability for failure to release.** After an order of court for the release of an attachment, the sureties on the attachment bond become liable and the possession by the sheriff, if retained, becomes unlawful. (*Gardner v. Donnelly*, 86 Cal. 367, 18 Pac. 682.)

§ 280. **Expense of keeping property levied upon.** The sheriff is allowed his necessary expenses in keeping and preserving property seized on attachment or execution, the amount to be fixed by the court and paid out of the fees collected in the action. (*California. Stats.* 1893, p. 507.)

§ 281. **Sheriff's fees to be paid.** The officer cannot be compelled to release property from attachment until his fees are paid. (*Robinett v. Connolly*, 76 Cal. 56, 18 Pac. 130; *Perrin v. McMann*, 97 Cal. 52, 31 Pac. 837.) But where levy has been released by a stay-bond, he must demand payment and offer to return the property upon payment of the amount lawfully due to him. (*Sam Yuen v. McMann*, 99 Cal. 497, 34 Pac. 80.)

§ 282. **Change of sheriffs—Fees on the release.** When a sheriff goes out of office, holding attached property in his possession, the party wishing to release must seek him and pay his fees in full up to the time of the release. (*Perrin v. McMann*, 97 Cal. 52, 31 Pac. 837.)

§ 283. **Attachment of mortgaged personal property.** When an officer is directed to attach personal property of such character as may by law be the subject of a valid mortgage as against third parties, he should, before proceeding to levy, or as soon thereafter as possible, ascertain if the property has been mortgaged; otherwise he may render himself liable for seizing mortgaged property without first satisfying the mortgage claim, as he is bound to take notice of all valid mortgages of record made under the statute authorizing mortgages of personal property.

§ 284. **Mortgage of personal property.** In California the following personal property may be mortgaged, so as to be valid security as against third parties without change of possession:—

“1. Locomotives, engines and other rolling stock of a railroad.

“2. Steamboat machinery, the machinery used by machinists, foundrymen and mechanics.

“3. Steam engines and boilers.

“4. Mining machinery.

“5. Printing presses and material; all type-setting machines, their material and accessories.

“6. Professional libraries.

“7. Instruments of surveyors, physicians, and dentists.

“8. Upholstery, furniture and household goods.

"9. Oil paintings, pictures and works of art.

"10. All growing crops, including grapes and fruit.

"11. Vessels of more than five tons' burden.

"12. Instruments, negatives, furniture and fixtures of a photograph gallery.

"13. The machinery, casks, pipes, tubes and utensils used in the manufacture or storage of wine, fruit brandy, fruit syrup or sugar; also wines, fruit brandy, fruit syrup, or sugar, with the cooperage in which the same are contained.

"14. Pianos and organs.

"15. Iron and steel safes.

"16. Cattle, horses, mules, swine, sheep, goats, and turkeys, and the increase thereof.

"17. Harvesters, threshing outfits, hay presses, wagons, farming implements, and the equipments of a livery stable, including buggies, carriages, harness, robes.

"18. Abstract systems, books, maps, papers, and slips of searchers of records.

"19. Raisins and dried fruits, cured or in process of being cured. Also all boxes, fruit graders, drying trays and fruit ladders.

"20. Bees and bee-hives, apiaries and apiary stock, including frames, combs and extractors, also honey at apiaries.

"21. Machinery, tanks, stills, agitators, leachers and apparatus used in producing and refining petroleum, asphaltum, fuel oils, lubricating oils and greases.

"22. The bedroom furniture, carpets, tables, stoves, ranges, cooking utensils and all furniture and equipments usually found in a hotel.

"23. All machinery used in the sawing and production of lumber, or the manufacture of lumber into lumber products, also wagons, logging trucks, donkey engines and cables, chains and stretchers, and all tools and appliances used in the manufacture of lumber.

"24. All furniture, fixtures, bars and appurtenances of saloons." (*California. Civ. Code, sec. 2955; Stats. 1907, p. 886.*)

§ 285. **Object and effect of record.** The object to be attained by requiring the recording of mortgages of personal property is the same as that providing for the registration of mortgages of real estate. The same general principles are alike applicable in each case. The design is to give notice to the public of all existing encumbrances upon real or personal estate by mortgage. The recording of the mortgage is therefore made by the code the equivalent of an immediate delivery and continued change of possession, and creditors and subsequent purchasers or encumbrancers are bound by the notice which it imparts. By and under it, the mortgagee is, in law, in possession of the chattels, and an officer having an attachment or execution against the mortgagor, is not authorized to levy upon them without first paying the mortgage debt.

§ 286. **Requisites for validity.** "A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property, in good faith and for value, unless:—

"1. It is accompanied by the affidavit of all the parties thereto that it is made in good faith and without any design to hinder, delay or defraud creditors.

"2. It is acknowledged or proved, certified and recorded in like manner as grants of real property." (*California. Civ. Code, sec. 2957.*)

A mortgage of personal property must be recorded in the office of the county recorder of the county in which the mortgagor resides, if the mortgagor be a resident of this state, and it shall also be recorded in the county in which the property mortgaged is situated, or to which it may be removed. (*California. Stats. 1907, p. 853.*)

§ 287. **Payment of mortgage before levy.** "Personal property mortgaged may be taken under attachment or execution issued at the suit of a creditor of the mortgagor; . . . but, before the property is so taken, the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest, or must deposit the amount thereof with the county clerk or treasurer, payable to the order of the mortgagee." (*California. Civ. Code, secs. 2968, 2969.*)

A transfer of property by chattel mortgage, properly executed and recorded, passes the title without delivery. (*California. Civ. Code, sec. 2957.*) The mortgagee is, in law, in possession of the mortgaged chattels, and an officer having an attachment or execution against the mortgagor is not authorized to levy upon them without first paying the mortgage debt. (*Berson v. Nunan, 63 Cal. 550.*)

A transfer of property by chattel mortgage, executed with the formalities of law and recorded, passes the title, although conditional and defeasible,

whether the property be or be not delivered. The rights of the parties to the mortgage are fixed by the code. They are purely statutory rights, and as the code declares that such a mortgage is not void as to creditors or subsequent purchasers, for want of an actual and continued change of possession, the title of the mortgagee is not affected for want of it. (*Heyland v. Badger*, 35 Cal. 404.)

Where, on the trial of an action for the replevin of goods from a defendant who, in answer, admitted the taking, but justified under legal process against a third party, held and served by him as sheriff, it was proved by plaintiff that he held an unsatisfied chattel mortgage of the goods, duly executed by said third party, for their purchase price, of which defendant had notice: *Held*, that upon this state of facts, and in absence of any evidence tending to justify the taking of the goods by defendant, plaintiff was entitled to judgment for their recovery. (*Stringer v. Davis*, 35 Cal. 25.)

§ 288. **Liability for wrongful levy.** Under a statute requiring prior payment of the mortgage debt before mortgaged personal property can be attached, the officer is liable to the mortgagee as for a conversion if he levies an attachment and appoints a keeper without complying with the statute, although he does not move or otherwise disturb the property. (*Irwin v. McDowell*, 91 Cal. 119, 27 Pac. 601.)

If the officer seize such property without payment of the mortgaged debt, the party injured may, by action, recover the amount which will compensate him for all the detriment proximately caused by the breach. The law casts upon an officer the duty or

obligation of paying to a mortgagee the amount of the debt due the mortgagee before he, the officer, may take the property, and therefore if he seizes such property without paying, tendering or depositing the amount due, the detriment proximately caused by such seizure is not the value of the property seized, but the amount of the mortgage debt. (*Wood v. Franks*, 56 Cal. 217.)

§ 289. **Creditor to advance payments.** The officer is not bound to make the seizure unless the attaching creditor furnish him with the requisite funds to make the payment. A failure to furnish the funds would be a good defense by the officer in a suit against him by the attaching creditor. If, however, the officer, waiving his right to be protected, seizes the property without payment, tender, or deposit, he assumes to make good to the mortgagee the detriment caused by the seizure, and the mortgagee is not left to his action of trover or replevin. (*Wood v. Franks*, 56 Cal. 217.)

§ 290. **Growing crops mortgaged—Continuance of lien.** "The lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, so long as the same remains on the land of the mortgagor." (*California. Civ. Code, sec. 2972.*)

In Nevada the lien of a mortgage upon a growing crop continues until after the crop is harvested and threshed or baled or otherwise prepared for market and delivered to the mortgagee or his order. (*Nevada. Gen. Stats. 1885, sec. 2635.*)

§ 291. **Farming on shares — Attachable interest.**

Where two persons who are tenants in common, the one farming the land of the other under an agreement by which the former is to give the owner of the land a part of the crop raised for his own use, a contract may be entered into between them, by which the one who performs the work becomes divested of an attachable interest until the conditions of the contract have been complied with. In the case of *Howell v. Foster*, 65 Cal. 169, 3 Pac. 647, the court say:—

“There is no doubt that where one man farms land of another under an agreement by which he is to give the owner a part of the crop raised for its use, he and the owner, in the absence of a stipulation providing otherwise, become tenants in common of the crops raised. But it is just as clear that the agreement between the parties may be so framed as to secure to the owner of the land the ownership of the product until the performance of a certain stated condition. (*Wentworth v. Miller*, 53 Cal. 9; *Andrew v. Newcomb*, 32 N. Y. 419; *Lewis v. Lyman*, 22 Pick. 437; *Ponder v. Rhea*, 32 Ark. 435; *Smith v. Atkins*, 18 Vt. 461.) In the present case the parties expressly agreed that all of the grain raised on the land by Mayfield should be delivered to the plaintiff and remain his property, and in no way subject to the disposal of Mayfield until all of such advances as the plaintiff may have made him had been satisfied, and he had thereupon received from the plaintiff his share of the grain, which plaintiff bound himself to deliver. Until all this happened all of the grain, by the express contract of the parties, was to be and remain the property of the plaintiff, and in no way

subject to the disposal of Mayfield. That it was competent for the parties so to provide has already been shown, and having so provided, it results that Mayfield had no attachable interest in the grain at the time of the levy of the writs in question. 'It is a fundamental principle,' says Drake on Attachment (*sec.* 245), 'that an attaching creditor can acquire no greater right in attached property than the defendant had at the time of the attachment. If, therefore, the property be in such a situation that the defendant has lost his power over it, or has not yet acquired such interest in or power over it as to permit him to dispose of it adversely to others, it cannot be attached for his debt.' See, also, authorities cited in support of the text, and *Tuohy v. Wingfield*, 52 Cal. 319."

§ 292. **Attachment of crop after severance.** An attachment upon a crop after severance is levied by taking the property into the possession of the officer; but if the crop is still subject to the lien of a valid crop mortgage, the provision requiring payment or tender of the mortgage debt to the mortgagee is applicable. (*California. Civ. Code, secs. 2955, 2969.*)

§ 293. **Attachment of pledged property.** Under the California Code provisions (*see secs. 230, ante, 294 post*), it is held that while the interest of a pledgor in the property pledged is subject to attachment and may be reached in the hands of the pledgee, yet this can only be done by serving and enforcing a garnishment on the pledgee, and not by a seizure of the pledge. (*Treadwell v. Davis*, 34 Cal. 601, 94 *Am. Dec.* 770.) Property pledged is thus held to

be property not capable of manual delivery. It will be noticed, however, that under the present provision the persons garnished and also the defendant may be examined under oath pending the attachment, and "the court or judge may, after such examination, order personal property capable of manual delivery to be delivered to the sheriff on such terms as may be just, having reference to any liens thereon or claims against the same." (*California. Code Civ. Proc., sec. 545.*)

§ 294. **Pledge of goods—Rights of pledgee.** Under the California practice (*Code Civ. Proc., secs. 542, 544, 545, 688*), while the interest of the pledgor of property is subject to execution, yet this cannot be done by seizure of the pledge, but only by enforcing a garnishment on the pledgee. (*Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770.*)

When pledged property is allowed to go back into the possession of the pledgor, it is subject to attachment by his creditors. (*Salinas City Bank v. Graves, 79 Cal. 192, 21 Pac. 732.*)

Personal property in the hands of a bailee may be attached, all rights of the bailee being, however, preserved. (*Humphreys v. Hopkins, 81 Cal. 551, 15 Am. St. Rep. 76, 22 Pac. 892, 6 L. R. A. 792. See, also, sec. 293, ante.*)

§ 295. **Prior liens must be satisfied.** An officer cannot take property belonging to the defendant in the writ from the possession of a third party who has a lien upon the property without first satisfying the claim of the lien. This principle applies to all valid subsisting liens dependent upon possession, whether

such liens originate in the common law or are statutory. When the officer finds, therefore, that the property which he is instructed to attach is subject to any such lien for repairs, storage, feed and pasturage, board and lodging, or the like, he should notify the plaintiff in attachment and decline to seize the property unless money is advanced sufficient to release the lien.

§ 296. **Liens upon personal property.** (a) *For repairs.*—"A person who makes, alters or repairs any article of personal property, at the request of the owner or legal possessor of the property, has a lien on the same for his reasonable charges for work done and materials furnished, and may retain possession of the same until the charges are paid."

(b) *For safe keeping, etc.*—"Every person who, while lawfully in possession of an article of personal property, renders any service to the owner thereof by labor or skill employed for the protection, improvement, safe keeping or carriage thereof, has a special lien thereon, dependent on possession for the compensation, if any, which is due to him from the owner for such service; and livery, or boarding, or feed-stable proprietors and persons pasturing horses or stock have liens dependent on possession for their compensation in caring for, boarding or pasturing such horses or stock."

(c) *For purchase price.*—"One who sells personal property has a special lien thereon, dependent on possession, for its price, if it is in his possession when the price becomes payable, and may enforce his lien in like manner as if the property was pledged to him for the price."

(*d*) *Factor's lien*.—"A factor has a general lien, dependent on possession, for all that is due to him as such, upon all articles of commercial value that are intrusted to him by the same principal."

(*e*) *Banker's lien*.—"A banker has a general lien, dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business."

(*f*) *Shipmaster's lien*.—"The master of a ship has a general lien, independent of possession, upon the ship and freightage, for advances necessarily made or liabilities necessarily incurred by him for the benefit of the ship, but has no lien for his wages."

(*g*) *Seaman's lien*.—"The mate and seaman of a ship have a general lien, independent of possession, upon the ship and freightage, for their wages, which is superior to every other lien."

(*h*) *Officer's lien*.—"An officer who levies an attachment or execution upon personal property acquires a special lien, dependent on possession, upon such property, which authorizes him to hold it until the process is discharged or satisfied, or a judicial sale of the property is had." (*California. Civ. Code, secs. 3049-3057.*)

§ 297. **Lien for cutting timber, etc.** Under the California statute a person who cuts timber and manufactures it into ties under employment of the owner of the land, and who piles the same and remains in possession, has a lien thereon for the sum due him thereon, and he may retain possession, as against an officer with execution or attachment against the owner of the land, until his charges are

paid. (*Douglass v. McFarland*, 92 Cal. 656, 28 Pac. 687.)

§ 298. **Waiver of lien.** When a person who has goods in his possession states to one who is about to take possession of the same by legal process that he has no charges on the goods, this is a waiver of his lien for charges, if any he had. (*Blackman v. Pierce*, 23 Cal. 509.)

§ 299. **Sale before judgment — Perishable property.** Statutory provision is made for the sale of attached property before judgment in cases where the property is perishable, or its keeping would be attended with great expense, or the interest of the parties would be subserved by such sale.

In California, "if any of the property attached be perishable, the sheriff must sell the same in the manner in which such property is sold on execution. The proceeds, and other property attached by him, must be retained by him to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment recovered previous to the issuing of the attachment." (*California Code Civ. Proc.*, sec. 547.) Notices of the time and place of sale should be posted in three public places of the township or city (as the case may be) where the sale is to take place for such time as may be reasonable, considering the character and condition of the property.

"Whenever property has been taken by an officer under a writ of attachment, and it is made to appear satisfactorily to the court, or a judge thereof, that the interest of the parties to the action will be sub-

served by a sale thereof, the court or judge may order such property to be sold in the same manner as property is sold under an execution, and the proceeds to be deposited in the court, to abide the judgment in the action." (*California. Code Civ. Proc., sec. 548.*)

All sales of property under execution must be made at auction to the highest bidder, between the hours of nine in the morning and five in the afternoon. Sales by order of the court must be made by posting written notice in three public places in the township or city where the sale is to take place, for not less than five nor more than ten days, except where the time of sale is fixed in the order of the court. (*California. Code Civ. Proc., secs. 692, 694.*)

An officer selling without giving the statutory notice forfeits five hundred dollars to the aggrieved party, in addition to his actual damages. (*California. Code Civ. Proc., sec. 693.*)

CHAPTER XI.

GARNISHMENT.

- § 300. Garnishment—Nature of.
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- § 319. Garnishment of common carrier.
- § 320. Garnishment of warehouseman.
- § 321. Garnishing annuity.
- § 322. Garnishment of pledged property.

§ 300. **Garnishment—Nature of.** The attachment of debts, credits, and other personal property not capable of manual delivery by service of notice and copy of the writ, is what is generally termed garnishment. Upon serving the same the officer must request the person to whom it is delivered to make a statement in response to the garnishment. It is a custom

with officers to deliver with the notice of garnishment a printed blank for an answer or statement. The service of garnishment should be promptly performed, the nature of the kind of personal property thus attachable being easily and quickly transferable. When served upon a corporation, the notice should be directed to the corporation by its full name.

§ 301. **Inventory of property — Request to garnishee.** “The sheriff must make a full inventory of the property attached and return the same with the writ. To enable him to make such return as to debts and credits attached, he must request, at the time of service, the party owing the debt or having the credit to give him a memorandum, stating the amount and description of each, and if such memorandum be refused, he must return the fact of refusal with the writ.” (*California. Code Civ. Proc., sec. 546.*)

§ 302. **Penalty for failure to answer.** In serving a garnishment, where the person served refuses to give the officer the required statement or memorandum of the debt or of his having the credit, it is proper to inform him of the provisions of law, providing that he may be required to pay the costs of any proceeding taken for the purpose of obtaining information respecting the amounts and description of such debt or credit.

§ 303. **Examination of defendant limited.** Under the California provision for examination of the person garnished (*Code Civ. Proc., sec. 545*), which provides that “the defendant may also be required

to attend, for the purpose of giving information respecting his property," it is held that the defendant cannot be compelled to submit to an examination as to the credits or other personal property belonging to the defendant, or owing any debts to the defendant at the time of service upon them of a copy of the writ and notice, as provided in the last two sections, shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, liable to the plaintiff for the amount of such credits, property, or debts, until the attachment be discharged, or any judgment recovered by him be satisfied." (*California. Code Civ. Proc., sec. 544.*)

A garnishee can only be required to answer as to his liability to the debtor defendant at the time of the service of the garnishment. (*Norris v. Burgoyne*, 4 *Cal.* 409.)

§ 304. **Property in custody of the law.** Money in the hands of the sheriff, collected on execution, is not the subject of garnishment, unless by express authority of law. (*See sec. 218, ante.*)

§ 305. **Collection from garnishee.** Debts and credits due to a defendant, when attached, may be collected by the sheriff, if the same can be done without suit; and the sheriff's receipt is a sufficient discharge for the amount paid. (*California. Code Civ. Proc., sec. 547.*) When collected, they must be held to answer the judgment.

§ 306. **Distinction between debts and credits.** In the statute prescribing how "debts and credits" may be attached, a distinction is made between them, and

a return showing levy upon one constitutes no lien upon the other. A debt is money owing by the garnishee to the defendant, which may be paid over to the sheriff; while credits are something belonging to the defendant but in the possession of the garnishee, such as promissory notes which may be delivered up or transferred to the sheriff. (*Gow v. Marshall*, 90 Cal. 565, 27 Pac. 422.)

§ 307. **Garnishment of corporation.** To render the process of attachment effectual against a corporation as garnishee, the writ and notice must be served on the president or other head of the same, or the secretary, cashier, or other managing agent thereof. In the case of a banking corporation, service of process on the teller, whose only duty is to receive and pay out all moneys which come into and go out of the bank, is not sufficient to bind the corporation. (*Kennedy v. Hibernia Savings and Loan Society*, 38 Cal. 151.)

A savings bank cannot avoid its liability to pay over the money of its depositor on a garnishment at the suit of depositor's creditor, on the ground that its by-laws, assented to by the depositor, make his pass-book, in which his account is kept, transferable to order (*Witte v. Vincenot*, 43 Cal. 325); for such pass-book is not a negotiable instrument in a commercial sense, nor can the agreement of the parties make it so.

§ 308. **Garnishment—Offset allowable.** Where a railroad company is served with garnishment for the purpose of attaching wages of an employee, and the company is liable for the board and other debts con-

tracted by the employee in an amount equal to the wages due, the garnishment is ineffectual. (*In re Union Pacific Railway Company v. Gibson*, 15 Colo. 299, 25 Pac. 300.)

§ 309. **Garnishment of estate funds.** Money in the hands of an administrator may be garnished as the property of the distributee after decree of distribution has been made, but not before. (*Estate of Nerac*, 35 Cal. 392, 95 Am. Dec. 111.)

§ 310. **Stocks attachable by garnishment.** Stocks or shares which the defendant may have in any corporation or company, together with the interest and profit thereon, may be attached, and if judgment be recovered, be sold to satisfy the judgment and execution. In California "stocks or shares, or interest in stocks or shares, of any corporation or company, must be attached by leaving with the president or other head of the same, or the secretary, cashier, or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached, in pursuance of such writ." (*California. Code Civ. Proc., sec. 542.*)

§ 311. **Mortgage is attachable by garnishment.** Debts secured by mortgage, like other debts, may be attached by garnishment, but in no other way, and their payment may be enforced under the provisions of the code relating to proceedings supplementary to execution. (*McGurren v. Garrity*, 68 Cal. 566, 9 Pac. 839.)

§ 312. **Stock not transferred on books.** No transfer of stock issued by a corporation is good

against third parties, under the California code provisions, unless the transfer be made upon the books of the corporation (*Civ. Code, sec. 324*). Therefore, although such shares be sold and delivered, they may still be subjected to attachment and sale in an action against the vendor, if no transfer has been made on the corporation books.

Where shares of stock in a corporation have been regularly transferred as security for a loan, the mortgagee is the only proper garnishee in a suit against the mortgagor, and attachment on his interest in the corporation. In such a case the corporation is no longer privy to the interest of the mortgagor, which is a mere equity in the hands of the mortgagee. (*Edwards v. Beugnot, 7 Cal. 162.*)

§ 313. **When garnishment is not a lien.** Service of a copy of the writ and notice of garnishment upon a third party constitutes no lien on property of the defendant in the hands of a third party capable of manual delivery. The California code (*Code Civ. Proc., sec. 542; sec. 230, ante*) provides one distinct method of levying upon personal property capable of manual delivery, and another equally distinct method of levying upon personal property not capable of manual delivery. That there are different ways pointed out to the officer by the law, in one or the other of which he must act, according to the nature of the property he is about to seize, should not be lost sight of. The writ affects property only from the time of a lawful levy in accordance with the statute. (*Johnson v. Gorham, 6 Cal. 195, 65 Am. Dec. 501.*)

§ 314. **Attachable interest of lessee in leased property.** A contract by which A lets B have a flock of sheep which he owns, and of which he is to retain the ownership, to keep for three years, and by which B is to deliver to A the wool sheared from the sheep, and A is to sell it and pay B one half the proceeds, and by which B is to deliver to A at the end of the term the sheep, and A is then to divide with B the increase, giving B one half the increase as compensation for his services, does not give B such an interest in the sheep or increase as will support a seizure of them under an attachment against the property of B. The interest of B in the sheep must be reached by his creditors under a different proceeding. (*Tuohy v. Wingfield*, 52 Cal. 319.) The proper procedure would have been by garnishment on the owner of the sheep.

§ 315. **Garnishment of exempt wages an abuse of process.** It is declared in *Nix v. Goodhill*, 95 Iowa, 282, 58 Am. St. Rep. 434, 63 N. W. 701, and by numerous other authorities, that it is a malicious abuse of legal process for a creditor to direct a sheriff to serve an execution by garnishment for a debt due for personal earnings exempt from execution. The case above cited was an action for malicious garnishment of wages exempt from execution, and is thus reported: "The plaintiff, Nix, was a judgment debtor of the defendant, Goodhill. The plaintiff was an employee of the Illinois Central Railway Company, and the head of a family. On January 21, 1894, there was due him from the company twenty-five dollars, his wages for the forty days next preceding. The company paid its employees about the 25th of each

month. Such wages, being his personal earnings, were exempt from execution. Goodhill took out execution on his judgment, garnished the company, and on the day that the garnishment was returnable the proceeding was dismissed. The plaintiff then brought this action, alleging, among other things, that the defendant, well knowing that said personal earnings were exempt from execution, and would be paid in a few days, 'knowingly, willfully, and maliciously, and with the purpose and intent to vex, harass, and injure this plaintiff, and to deprive him of said money, and the use thereof, and to unlawfully subject said exempt money to the payment of debts, and to vex, harass, and annoy said railroad company, so as to cause said railroad company to discharge plaintiff from their employ, and to cause and compel this plaintiff, in order to prevent such discharge, to use such exempt money, against his will, to pay the judgment hereinafter mentioned and described,' caused and directed the sheriff to garnish such wages.

"The only question in the case arises on the demurrer to the petition. Because of a growing practice in the state, the question is an important one. By observing the averments of the petition it will be seen that the action is for an abuse of legal process in a civil suit, the defendant having directed the sheriff to serve the execution by a garnishment of the company for a debt due for personal earnings exempt from execution. It is a rule of law of very general recognition that an action will lie for an abuse of such process. In *Cooley on Torts*, second edition, page 220, it is said: 'If process, either civil or criminal, is willfully made use of for a purpose not justified by the law, this is abuse for which an

action will lie.' The same section gives some illustrations, as 'entering up a judgment and suing out execution after a demand is satisfied, suing out an attachment for an amount greatly in excess of the debt; causing an arrest for more than is due, and levying an execution for an excessive amount.' These are but some of the abuses for which an action will lie. In fact, the right to such an action is not seriously to be questioned, but the more difficult question is, What is an abuse of process, so as to render it actionable? We should be careful to observe a distinction between suing out of a writ and the improper use of the writ after it is issued, for such a distinction is preserved on authority. See *Bartlett v. Christilf*, 69 Md. 219, 14 Atl. 518. In the same case it is said: 'There are instances in which the writ, regularly and properly sued out, was perverted, abused, and made an instrument of oppression. Either something not warranted by its terms or something in excess of that which was warranted was done under it. It would, indeed, be a serious reproach to the law, if in such cases it afforded no remedy or redress to the injured party. The denial of a remedy in such cases, upon the ground that the law was incapable of affording redress, would be a most serious reflection upon the remedial efficacy of any system of jurisprudence. It would proclaim to the evil-disposed an unrestricted license to vex, harass, and injure, without accountability, even though their victims should be utterly ruined in their circumstances.' In the same case it is said: 'A malicious abuse of legal process consists in the malicious misuse or misapprehension of that process to accomplish some purpose not warranted or commanded by the writ.' In 2 Addison

on Torts, section 868, it is said: 'Whoever makes use of the process of the court for some private purpose of his own, not warranted by the exigency of the writ or the order of the court, is answerable to an action for damages for an abuse of the process of the court.' The authorities are strong, if not quite uniform, that the unlawful use of the process must be malicious, and without probable cause; the rule being akin, in that respect, to actions for malicious prosecution. In fact, the two actions are of the same general character, the one being the malicious prosecution of a suit, and the other the malicious use of process issued in aid of a proceeding, either pending or determined. Keeping in view that such an action is warranted when the process of the court is maliciously and without probable cause misused or misapplied to accomplish some purpose not warranted or commanded by the writ, we are in position to apply the rule to the facts in this case. The property in question is by law exempt from execution, which means that it is not to be seized upon execution for the debts of the owner: Code, sec. 3072. Hence such a levy is not warranted under the law. The execution, if against the property of the judgment debtor, requires the sheriff 'to satisfy the judgment and interest out of property of the debtor subject to execution: Code, sec. 3033. It is thus seen that nothing in the law nor on the face of the process warrants the seizure of exempt property. But where it is done, more than the unwarrantable act is required. It must be done maliciously, and without probable cause. In this case it is admitted that the defendant directed the garnishment, not only with knowledge of the exemption, but maliciously, and with a purpose unlawfully to subject the exempt money to the

payment of his debt, by vexing and harassing the company, and to compel the plaintiff, in order to avoid a discharge, to use the exempt money against his will to pay the debt. The facts bring the case clearly within the rule. It is clearly an unlawful use of the process, and as clearly an abuse of it. Appellee seems to think the fact important that the execution was valid, and that what was done 'was in excess of that which was warranted.' The rule of the authorities is, that such an action lies for an abuse of process legally issued. In *Bartlett v. Christilf*, 69 Md. 219, 14 Atl. 518, it is said, in speaking of such an abuse of process: 'In brief, it is the malicious perversion of a regularly issued process to accomplish some purpose whereby a result not lawfully nor properly attainable under it is secured.' That is precisely what was done under the process in this case. Appellee makes the claim that the exemption was the debtor's personal privilege, which might be claimed or waived at his option. The same would be true of the levy upon the property of a third person. If he did not assert his rights, his property might be sold for the debts of another. But would the law permit it to be taken with the purposes and motives admitted in this case, without remedy for such an act? We think it is a mistaken view that the exempt property of a judgment debtor may rightfully be taken on execution, relying on the exercise of a personal privilege to retake or protect it as exempt. It is protected from interference in such manner both by the law and the face of the writ, which commands the taking of property not exempt from execution. The rule claimed for this personal privilege would permit the judgment creditor to enter the home, and take there-

from provisions and household goods, exempt, with the purpose to vex and harass the debtor into the payment of a debt or judgment. Such a proceeding is a misuse and abuse of the processes of the court, and, when done with the motives indicated, it is actionable. No case cited, nor that we have discovered, is against such a rule. The demurrer to the petition should be overruled."

§ 316. **What is not a good service of garnishment.**

In *re Kittrell v. Perry Lumber Co.*, 107 Tenn. 148, 64 S. W. 48, a garnishment proceeding was intended to be against the Creelman Lumber Company, and to have that company answer and disclose property of the Perry Lumber Company in its hands or under its control. The garnishment notice was in the following words:—

"Mr. Charles M. Gates, agent for F. E. Creelman Lumber Co.: By virtue of an attachment in my hands in favor of J. M. Kittrell and Webb and Wall, against the estate of the Perry Lumber Co., I attach all the property, choses in action, and effects of every kind in your hands belonging to the said Perry Lumber Co., and all debts you or your firm owe them," etc.

"It is evident," said the court, "that this notice is not to the Creelman Lumber Company, but to Charles M. Gates. The designation of Mr. Gates as agent for the Creelman Lumber Company is a mere *descriptio personæ*. The company is not obligated by this notice to make an appearance and answer."

The notice should have read: "To the F. E. Creelman Lumber Co., Charles M. Gates, agent."

In garnishment proceedings against a bank, where the president and cashier are absent, notice and a copy of the order of attachment, served upon the bookkeeper thereof during business hours, is sufficient. (*First Nat. Bank of Blue Hill v. Turner*, 30 Neb. 80, 46 N. W. Rep. 290.) Section 935 of the Nebraska code provides that in garnishment "the copy of the order and the notice shall be served upon . . . if a corporation, they shall be left with the president or other head of the same, or the secretary, cashier, or managing agent thereof." The bookkeeper of the bank was the managing agent thereof. He was the only person that the officer found in the bank upon whom service could be made; and service upon him during business hours, at the place of doing business, was declared by the court to be sufficient. In the absence of the officers named for service, the bookkeeper was the acting managing agent of the corporation. In line with this is the decision of the supreme court of Minnesota in the case of *State ex rel. Arnold v. Justus*, 84 Minn. 237, 87 N. W. 770, 55 L. R. A. 325, as follows:—

"Under the constitution of the state of Illinois, in case of disability of the governor the lieutenant governor shall act in his place, and upon the disability of the lieutenant governor the president *pro tem.* of the senate shall act as governor. Where the duties of the chief executive of that state are supplied by either of these constitutional substitutes, it is not improper to designate such substitute as the 'acting governor,' in which case the attestation by the secretary of state, under the state seal, as 'by the governor,' is proper, and requires full faith and credit from foreign jurisdictions."

§ 317. **Garnishment of growing crops.** Subdivision 5 of section 542 of the Code of Civil Procedure provides for the attachment of unripe growing crops. Since the decision in *In re Raventas v. Green*, 57 Cal. 254, the above subdivision has been amended by the addition of the following words: "except in the case of attachment of growing crops, a copy of the writ, together with a description of the property attached, and a notice that it is attached, shall be recorded the same as in the attachment of real property."

In the case of *Raventas v. Green*, 57 Cal. 254, it is decided that an attachment upon such property in the possession of the defendant is sufficiently levied by serving upon him copies of the writ and statutory notice; and if the sheriff does nothing further until the crop is ripe, when he gathers it, there is no abandonment of the attachment. In that case the court say:—

"There is no doubt that an unripe growing crop of grain is property. It is property subject to attachment (*Code Civ. Proc., sec. 541*), and is personal property (*Civ. Code, sec. 2955; Davis v. McFarlane*, 37 Cal. 638, 99 Am. Dec. 340.) And it is personal property not capable of manual delivery (*Davis v. McFarlane, and authorities there cited*). Being personal property not capable of manual delivery, and being subject to attachment, how is it to be attached? In the third subdivision of section 542 of the Code of Civil Procedure, it is provided that 'personal property capable of manual delivery must be attached by taking it into custody'; and in the fifth subdivision, that 'debts and credits, and *other personal property not capable of manual delivery*, must be attached by leaving with the person owing such debts, or having

in his possession or under his control such credits and other personal property, or with his agent, a copy of the writ and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession or under his control belonging to the defendant, are attached in pursuance of such writ.' . . . The purpose of the statute was, as its language indicates, to declare the manner in which property subject to attachment should be attached; and with respect to personal property, provides that such property, when capable of manual delivery, must be attached by the officer taking it into his custody, but that where not capable of manual delivery, must be attached by leaving with the person having it in his possession or under his control, or with his agent, a copy of the writ and a notice that it is attached in pursuance of such writ. Personal property not capable of manual delivery, which is in the hands of the defendant to the attachment suit, is as much liable to attachment as if in the hands of a third person."

§ 318. **Owner of safe-deposit vault is subject to garnishment.** Under a statute requiring a garnishee to answer as to any personal property of the defendant "under his control" a bank which has rented a box in a safety deposit vault therein to the defendant is subject to garnishment, where the boxes in the vault can be opened only by two keys, one a master key in the possession of the bank, and the other a private key, in the box-renter's possession. The garnishee in such a case has "control of the contents of the box, though it may be impossible for him to answer specifically as to the contents thereof, and, as the court

may inquire into the contents of the box by causing the defendant to be examined as a witness, the garnishee should retain the exclusive control thereof until he is discharged by the court." (*Trowbridge v. Spinning*, 23 *Wash.* 48, 62 *Pac.* 125, 83 *Am. St. Rep.* 806, 54 *L. R. A.* 204.)

The question whether property contained in a box in the safe of a safe-deposit company is subject to garnishment or not has not, so far as we are aware, been much considered or finally determined. In one case it was held to be proper to direct the sheriff to open a box and make an actual seizure of property in the custody of a safe-deposit company, the court saying: "Neither the safe nor the box constituted any portion of the defendant's dwelling, and they were not within the protection which the law affords to that against an officer acting under civil process. They were simply places of deposit and safe-keeping for the defendant's property, which the sheriff may enter to make the seizure required by law in the execution of the process in his hands. If that were not so, there would be nothing to prevent a failing or insolvent debtor from turning all his property into valuable securities or other articles requiring but little space for their custody, and then placing them in the hands of a safe-deposit company for preservation and defying all the efforts of his creditors to satisfy their debts by resorting to them. That would afford an expedient for the success of fraudulent designs which might render the laws of the state for the collection of debts entirely powerless. No such effect could be given a deposit of that nature without at once defeating the object apparently designed to be secured by the law in rendering the debtor's property

liable to the process issued in favor of his creditors in actions brought to recover their just debts."

§ 319. **Garnishment of common carrier.** It is held in *Baldwin v. Great Northern Railway Co.*, 81 Minn. 247, 83 Am. St. Rep. 370, 83 N. W. 986, 51 L. R. A. 640, that property in the hands of a common carrier received for transit to a place outside this state is not subject to garnishment.

In *Landa v. Holck*, 129 Mo. 663, 50 Am. St. Rep. 459, 31 S. W. 900, *held* that property in the hands of a common carrier awaiting shipment is subject to garnishment at any time before its transit has commenced. And see, also, *Van Camp etc. Co. v. Plimpton*, 174 Mass. 208, 75 Am. St. Rep. 296, 54 N. E. 538.

§ 320. **Garnishment of warehouseman.** A garnishment of a warehouseman having personal property of the defendant in his possession charges such warehouseman with the responsibility of retaining the property as in the custody of the law, in order that it may be applied to the satisfaction of the debt on which the garnishment was placed. (*Cooley v. Minnesota etc. Ry. Co.*, 53 Minn. 327, 39 Am. St. Rep. 609, 55 N. W. 141.)

§ 321. **Garnishing annuity.** An obligation for one person to pay another a certain sum of money annually for life is subject to garnishment by the latter's creditors. (*Keiser v. Shaw*, 104 Ky. 119, 84 Am. St. Rep. 450, 46 S. W. 524.)

§ 322. **Garnishment of pledged property.** Under the California code provisions it is held that

while the interest of a pledgor in the property pledged is subject to attachment and may be reached in the hands of the pledgee, yet this can only be done by serving and enforcing a garnishment on the pledgee, and not by a seizure of the pledge. (*Treadwell v. Davis*, 34 Cal. 601, 94 Am. Dec. 770.) Property pledged is thus held to be property not capable of manual delivery. It will be noticed, however, that under the present provision the persons garnished and also the defendant may be examined under oath pending the attachment, and "the court or judge may, after such examination, order personal property, capable of manual delivery, to be delivered to the sheriff on such terms as may be just, having reference to any liens thereon or claims against the same." (*California. Code Civ. Proc., sec. 545.*)

CHAPTER XII.

ATTACHMENT OF REAL PROPERTY.

- § 323. Attachment of real property.
- § 324. Service on occupant.
- § 325. Absence of occupant.
- § 326. Failure to find record owner.
- § 327. Posting copy on real estate.
- § 328. What constitutes a complete attachment.
- § 329. Lien on real estate, when takes effect.
- § 330. Sufficiency of the return.
- § 331. How attachment may be released.

§ 323. **Attachment of real property.** The manner of levying the writ of attachment upon real property is as follows:—

“1. Real property, standing upon the records of the county in the name of the defendant, must be attached by filing with the recorder of the county a copy of the writ, together with a description of the property attached, and a notice that it is attached, and by leaving a similar copy of the writ, description, and notice with an occupant of the property, if there is one; if not, then by posting the same in a conspicuous place on the property attached.

“2. Real property, or any interest therein, belonging to the defendant and held by any other person, or standing on the records of the county in the name of any other person, must be attached by filing with the recorder of the county a copy of the writ, together with a description of the property and a notice that such real property and any interest of the defend-

ant therein, held by or standing in the name of such other person (naming him), are attached, and by leaving with the occupant, if any, and with such other person or his agent, if known and within the county, or at the residence of either, if within the county, a copy of the writ, with a similar description and notice. If there is no occupant of the property, a copy of the writ, together with such description and notice, must be posted in a conspicuous place upon the property." (*California. Code Civ. Proc., sec. 542.*)

§ 324. **Service on occupant.** Under a statute requiring service of a copy of the writ upon the occupant, if any, it is not necessary to go to the land if an occupant can be served with a copy of the writ, description and notice without going to the land. It is not necessary to serve the defendant with a copy of the writ, description and notice except he be the occupant of the land attached. A person may be an occupant of real estate, although there be no buildings upon it. He may occupy the bare land for the storage of hay, or any other commodity. If he be an occupant in any capacity, he is entitled to notice of the levy, and a service upon him will be a service upon an occupant within the law. The service of the writ, description and notice upon an occupant (if there is one) is made by personally delivering to and leaving the copy with the occupant. (*See, also, sec. 325, post.*)

§ 325. **Absence of occupant.** When the statute requires service of a copy of the writ upon the "occupant of the property, if there be one," otherwise, post-

ing of the papers, if the officer finds no occupant "easily discoverable" or "visibly occupying the property" at the time of his visit, he should make the levy by posting without delay, although there be on the property a dwelling-house apparently tenanted. (*Davis v. Baker*, 72 Cal. 494, 14 Pac. 102.)

§ 326. **Failure to find record owner.** When the person who is not the defendant and in whose name the property stands on the records is not in the county and has no agent in the county, and neither he nor any agent of his has a residence in the county, and the service contemplated in the statute cannot thus be made, the attachment will not for that reason be invalidated, but such facts should be set out in the return made by the officer on the writ.

§ 327. **Posting copy on real estate.** If there is no fence or building upon the land attached, the posting, when required by the statute, may be done by setting a post or stake in the ground and attaching thereto the copy of the writ, description and notice.

§ 328. **What constitutes a complete attachment.** To complete the service and create a lien all the acts required by law must be performed. Neither act by itself will amount to a service of the attachment and create a lien on the property. The performance of all these acts is essential to create a lien, and the omission of either act is fatal to the creation of the lien. (*Wheaton v. Neville*, 19 Cal. 44; *Main v. Tappener*, 43 Cal. 209.) When the statute requires service upon the occupant or posting upon the premises, the levy is incomplete and ineffectual unless such

requirement be complied with. (*Maskell v. Barker*, 99 Cal. 642, 34 Pac. 340; *Watt v. Wright*, 66 Cal. 202, 5 Pac. 91.) But, in addition to this, the requisite acts should be performed in the order in which they are named in the code; that is to say, under the California practice the filing of a copy with the recorder must precede the service on an occupant or the posting on the premises.

In *Wheaton v. Neville*, *ante*, the court said that after the return of the writ the sheriff has no authority to take any proceedings for the completion of the attachment which he has previously omitted. Its efficacy, as a warrant of authority to him, is limited to acts performed while it remains in his possession.

§ 329. **Lien on real estate, when takes effect.** The lien of an attaching creditor of real estate takes effect immediately upon the levy of the attachment, and a deposit of a copy of the writ, together with a description of the land attached, with the county recorder; that is, as soon as all the statutory requirements have been complied with. (*Ritter v. Scannell*, 11 Cal. 239, 70 Am. Dec. 775.)

Under the old law in California the service on the occupant or posting on the property was required to be done before filing with the recorder. The practice is reversed under the present law.

Such lien cannot be diverted by the failure of the sheriff to make a proper return of the writ.

Our statute prescribes the manner in which real estate may be attached, but contains no express provision requiring that all the acts necessary to a valid levy shall be set out in the return; nor can such a rule be sustained. (*See sec. 330, post.*) The deposit

in the recorder's office of a copy of the writ, with a description of the property attached, is sufficient to operate as notice of the lien to third parties. (*Ritter v. Scannell*, 11 Cal. 239, 70 Am. Dec. 775.)

§ 330. **Sufficiency of the return.** If the return of the sheriff certifies generally that he attached certain real property, and further specifies certain acts which are insufficient to make a valid levy, the general return of service is sufficient to charge a subsequent purchaser with notice of the omitted facts, if the service was in fact complete. To support an execution sale the omitted facts may be shown by parol evidence of the officer, which evidence must be clear and satisfactory. (*Brusie v. Gates*, 80 Cal. 462, 22 Pac. 284.)

When the statute requires that papers be posted "in a conspicuous place on the premises," a return showing a posting "on the premises" is *prima facie* sufficient to support the levy. (*Davis v. Baker*, 72 Cal. 494, 14 Pac. 102.)

§ 331. **How attachment may be released.** Until the year 1876 there was no method prescribed by statute in California for the release of an attachment upon real estate on the records of the county in which the property was situated. At the session of the legislature in that year a clause was added to section 559 of the Code of Civil Procedure providing that "whenever an order has been made discharging or releasing an attachment on real property, a certified copy of such order may be filed in the offices of the county recorders in which the notices of attachment have been filed, and be indexed in like manner." It

then became quite generally the custom among sheriffs and constables to release attachments upon real property by filing with the county recorder a certified copy (certified by the officer) of the order of plaintiff's attorney to release the attachment; and in the case of *Smith v. Robinson*, 64 Cal. 387, 1 Pac. 353, the supreme court held that a plaintiff without order of court may direct the sheriff to release real property attached. (*See, also, sec. 269, ante.*)

CHAPTER XIII.

EXECUTION—GENERALLY.

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- § 335. Execution after time limited—Recall.
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§ 332. Property and rights subject to execution.

All property of the judgment debtor, not expressly by law made exempt from execution, is subject to execution and forced sale. The principle is laid down in the California Code of Civil Procedure (*sec.* 688) as follows: "All goods, chattels, moneys and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property seized and held under attachment in the action, are liable to execution."

§ 333. Within what time execution may issue.

Under the California practice, the party in whose favor judgment is given may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement. This applies to superior and justices' courts. In all cases other than for the recovery of money, in the superior court, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental proceedings. (*Code Civ. Proc., secs.* 681, 685, 901.)

§ 334. Same limit in foreclosure cases. The statute limiting the time for issuing execution upon a

judgment to five years after its entry applies to judgments rendered in suits to foreclose a mortgage or other lien equally as to mere personal judgments. (*Stout v. Macy*, 22 Cal. 647; *Dorland v. Hanson*, 81 Cal. 202, 15 Am. St. Rep. 44, 22 Pac. 552.)

§ 335. **Execution after time limited—Recall.** If an order be made granting an execution after the lapse of the statutory limit, such order will be annulled on *certiorari*. (*Cortes v. Superior Court*, 86 Cal. 274, 21 Am. St. Rep. 37, 24 Pac. 1011.)

When an execution has been improperly issued after the expiration of the time allowed by law for its issuance, the court may recall the same and order the sheriff to refund money collected thereon by him. (*McMann v. Superior Court*, 74 Cal. 106, 15 Pac. 448.)

§ 336. **Transcripts from justices' courts.** The filing and docketing of a transcript of a judgment rendered by a justice of the peace in the office of the clerk of the county does not empower the clerk of the court in which it is filed and docketed to issue an execution on the same after five years have elapsed from the date of its rendition. (*Kerns v. Graves*, 26 Cal. 156.)

§ 337. **Execution after death of a party.** "Notwithstanding the death of a party after the judgment, execution thereon may be issued, or it may be enforced as follows:—

"1. In case of the death of the judgment creditor, upon the application of his executor, or administrator, or successor in interest.

"2. In case of the death of the judgment debtor, if the judgment be for the recovery of real or personal property, or the enforcement of a lien thereon." (*California. Code Civ. Proc., sec. 686.*)

"If execution is actually levied upon any property of the decedent before his death, the same may be sold for the satisfaction thereof; and the officer making the sale must account to the executor or administrator for any surplus in his hands." (*California. Code Civ. Proc., sec. 1505.*)

§ 338. **Execution before entry of judgment.** An execution issued upon a valid judgment is sufficient authority to the sheriff to make a sale of lands. In the case of *Los Angeles Bank v. Raynor*, 61 Cal. 145, it was urged that the record showed that the judgment was not entered when the execution was issued, but the court held that it was not necessary that it should have been; that the enforcement of a judgment does not depend upon its entry or docketing; that these are merely ministerial acts, the first of which is required to be done for putting in motion the right of appeal from the judgment itself, and of limiting the time within which the right may be exercised or in which the judgment may be enforced, and the other, for the purpose of creating a lien by the judgment upon the real property of the debtor. But "neither is necessary for the issuance of an execution which has been duly rendered. Without docketing or entry, execution may be issued on the judgment, and land levied upon and sold (*Hastings v. Cunningham*, 39 Cal. 144) ; and the deed executed by the sheriff, in fulfillment of the sale, not only proves the sale, but also estops the defendant from controverting the title acquired by it."

§ 339. **Receipt of writ.** The receipt of a writ by the officer dates from the time he indorses it as received. A writ may be handed to a sheriff and he may refuse to "receive" it until his fees for service be paid. Before "receiving" the writ and indorsing upon it the time of its reception, the officer should examine it to satisfy himself that it is regular on its face. For it may sometimes happen, in the hurry of issuing a writ, that some feature essential to its validity may have been omitted by the clerk, and the omission have passed unnoticed by the person to whom it was delivered.

§ 340. **Writ cannot be received on Sunday.** In the absence of statutory authority, a writ of attachment or execution placed in the sheriff's hands on Sunday cannot be officially received by him on that day. It can only be considered officially in his hands when Sunday has expired. (*Whitney v. Butterfield*, 13 Cal. 335, 73 Am. Dec. 584. See, also, sec. 213, ante.)

§ 341. **What the writ must require.** The writ of execution issued out of the superior court must be issued in the name of the people, sealed with the seal of the court, and subscribed by the clerk, and be directed to the sheriff, and it must intelligibly refer to the judgment, stating the court, the county where the judgment-roll is filed, and if it be for money, the amount thereof and the amount actually due thereon, and if made payable in a specified kind of money or currency, the execution must also state the kind of money or currency in which the judgment is payable. (*California. Code Civ. Proc., sec. 682.*)

§ 342. **Delay in service of writ inexcusable.** The terse maxim, "Delays are dangerous," finds significant application in nearly all duties of the sheriffs and constables. It conveys an admonition which should never be lost sight of from one year's end to another. The evil of procrastination has subjected many an officer to loss, and they who are subject to it as a habit must prove unfitted for the discharge of the important duties that devolve upon them as officers. Some pertinent suggestions on this point are to be found in the decision quoted in section 31, *ante*.

An illustration in point (and there are many more on record in the courts) may be found in the case of *Howe v. Union Insurance Co.*, 42 Cal. 528, Fed. Cas. No. 6776, wherein the plaintiff was subjected to a loss of \$1,465, by reason of the neglect of an officer to serve a garnishment under an execution which had been placed in his hands. Howe commenced an attachment suit against one McCann, and garnished money of McCann in the defendant's hands, and afterwards recovered judgment and issued execution to the sheriff. The officer went to the office of the insurance company for the purpose of collecting the money. The secretary of the company admitted having the money, but did not pay it over. The sheriff did not levy the execution, supposing that the money would be paid in a day or two. Before any further steps had been taken, and within less than four months from the time when the attachment was issued and served, proceedings were commenced to have McCann declared a bankrupt. At that time the bankrupt law provided that all attachments upon mesne process within four months before the proceedings in bankruptcy should be thereby dissolved

in case the defendant in the attachment be declared a bankrupt. Under that provision it is clear that if the execution had been levied upon the fund before the proceedings in bankruptcy were commenced, he would have acquired a lien upon the fund, which would not have been divested by the proceedings in bankruptcy. As it was, the money went to the assignee in bankruptcy, and Howe was obliged to take merely his pro rata with the other creditors. The sheriff's proper course in the premises was to have served a garnishment upon the insurance company and demanded possession of the money.

§ 343. **Penalty for neglect to levy.** "If the sheriff to whom a writ of execution is delivered neglects or refuses, after being required by the creditor or his attorney, to levy upon or sell any property of the party charged in the writ which is liable to be levied upon and sold, he is liable to the creditor for the value of such property." (*California. Pol. Code, Sec. 4180.*)

§ 344. **Void and voidable writs.** Before making levy the officer should satisfy himself by examination of the writ that it is regular on its face. The decisions of the courts differ widely as to the responsibility of an officer in executing void and voidable writs. If a writ is not regular on its face, he may return it to the party who delivered it to him, who must take it for correction to the officer who issued it, if the error is such that correction can be made. A writ is not regular on its face if it is not issued in the name of the people, nor (if a superior court writ) if it has no seal. The word "seal" includes an impres-

sion of the seal required to be used upon the paper alone as well as upon wax or a wafer affixed thereto. If the writ is subscribed by a deputy clerk and not by his principal, it does not comply with the law, which provides that it must be subscribed by the clerk. Executions that are not regular on their face are liable to be vacated; and, although irregular and voidable in some instances, where they are issued upon a valid judgment, the officer cannot refuse to make a levy.

§ 345. **Irregularities in writ or proceedings.** When an execution is placed in the sheriff's hands, he is not bound to inquire whether there is a judgment to support it, or whether the execution corresponds exactly with the judgment. If it be regular on its face, it is his duty to execute it. But, although "a sheriff or other ministerial officer is justified in the execution of and must execute all process and orders regular on their face and issued by competent authority, whatever may be the defect in the proceedings upon which they were issued" (*California. Pol. Code, sec. 4187*), yet, if he know of any irregularity in those proceedings, he will put himself in jeopardy the moment he proceeds to execute the writ. The assurance of protection to the officer implied in the section here quoted is to be found in nearly all works that treat upon or refer to the duties of ministerial officers, and yet there are perhaps but few such officers who have not at some time or other found themselves in the position of party defendant in vexatious and expensive suits by blindly relying upon the unqualified promise contained therein. No legislative assurance of protection to an officer for

serving process illegally issued can divest a party aggrieved by reason of such service from his right to seek his remedy in the courts against the officer. After an officer has been brought into court in an action against him for taking property under an illegal process, he may or may not be able to justify himself and avert the penalties prescribed for willful wrongdoers, but his justification will then have come too late to shield him from the annoyances and expense of a defense. (*See, also, secs. 59, 203, 344, ante.*)

§ 346. **Execution—When void.** Executions not under seal, issued from a court which has been abolished, or is not of competent jurisdiction, or upon a void judgment, or upon a judgment against an administrator, or after the death of the judgment debtor, or after an appeal and stay, are instanced by the court as probable examples of void executions. (*Hunt v. Loucks, 38 Cal. 372, 99 Am. Dec. 404.*)

§ 347. **When voidable.** If an execution directs the levy for more money than the judgment calls for, it is not for that reason *void*, but only *voidable*. Executions which have been issued according to the established course of practice, and are not so erroneous that they cannot be amended, are not void. (*Hunt v. Loucks, 38 Cal. 372, 99 Am. Dec. 404.*)

§ 348. **When amendable.** If an execution calls for too much money, it will not be set aside, but amended, so as to agree with the judgment, upon the application of the parties to it, or either of them. (*Hunt v. Loucks, 38 Cal. 372, 99 Am. Dec. 404.*)

An execution which is not issued in the name of the people, or directed to the sheriff, is amendable, and therefore not void, but only voidable, and a sale under it is valid. (*Hibberd v. Smith*, 50 Cal. 511.)

§ 349. **Irregular writ—Duty of officer.** If an irregular or imperfect execution is amendable, it is not void, but only voidable, and it is the duty of the sheriff to serve and return it. (*Van Cleave v. Bucher*, 79 Cal. 600, 21 Pac. 954.)

The court has no power to make an order directing a sheriff to enforce an execution by levying on a particular piece of property. (*Fraser v. Thrift*, 50 Cal. 476.)

The plaintiff, in an action of ejectment, relied upon an execution sale, to which neither he nor the defendant was a party. The execution called for \$695 more than the judgment, but corresponded with it in other respects: *Held*, that the execution was not void, but voidable only, and the sale therefore valid. (*Hunt v. Loucks*, 38 Cal. 372, 99 Am. Dec. 404.)

If the execution calls for the amount of the judgment in the court below, and for the costs of an appeal also, it is not, for that reason, irregular. (*Id.*)

A sale made under a valid, though erroneous, judgment, which has not been reversed or set aside, is valid. (*Moore v. Martin*, 38 Cal. 428.)

If an officer receives an execution, and he knows that the judgment has been satisfied, he cannot levy thereunder.

If an execution correctly refers to a judgment, in such manner as to identify it, it is sufficient to justify the sheriff in enforcing it, even if it contains an error in reciting the day on which the judgment had been rendered. (*Franklin v. Merida*, 50 Cal. 289.)

§ 350. **Writ not open to collateral attack.** Executions which are merely voidable cannot be attacked collaterally even by the parties to them, much less by strangers. (*Hunt v. Loucks*, 38 Cal. 372, 99 Am. Dec. 404.)

§ 351. **When sheriff may levy on real property.** In the absence of any statute to the contrary, the sheriff may, on the request of the defendant in execution, properly levy on real estate, though there be personal property present amply sufficient to satisfy the execution. (*Smith v. Randall*, 6 Cal. 52, 65 Am. Dec. 475.) The request should be in writing.

§ 352. **Judgment set aside after levy.** If an execution is regularly issued on a valid judgment, entered on a default, and the sheriff levies on property by virtue of the same, and retains it several days, until the default is opened and the judgment set aside, and then returns it to the defendant, the plaintiff is not liable in damages for the seizure and detention of the property, if he acted without fraud. (*White v. Adams*, 52 Cal. 435.)

§ 353. **Staying execution.** If a judgment upon which an execution issues and the execution itself are void upon their face, the court has power on motion to afford relief, and can arrest the process. (*Sanchez v. Carriaga*, 31 Cal. 170.)

Notice of a motion to set aside an execution and a levy made thereunder will not operate as a stay of proceedings. (*Byran v. Berry*, 8 Cal. 130.) On this point the court say: "We think the district court did not err in overruling the motion to set aside the exe-

cution and levy. The notice that a motion would be made did not operate as a stay of proceedings. After giving the notice, the defendant should have procured an order staying the sale under the execution until his motion could have been heard. (*Greenup v. Brown, Breese* 252; *Beaird v. Foreman, Breese* 385, 12 *Am. Dec.* 197; *Robinson v. Chisseldine*, 4 *Scam.* 333.)

Where third parties have purchased at an execution sale, it is too late to move to set aside the execution.

An undertaking for costs and damages under section 941 of the Code of Civil Procedure, California, stays proceedings on an appeal in all cases, except those specified in sections 942-945; and it was held, in *Root v. Bryant*, 54 Cal. 183, that upon an appeal from a judgment for the foreclosure of a lien and the sale of the property subject thereto—the appeal being taken by a lienholder, not in possession of the land, whose lien was adjudged subordinate to the lien foreclosed—the undertaking for costs and damages stayed the judgment.

§ 354. **Sheriff cannot sell when stay is ordered.** A sheriff who sells property on an execution issued by a justice of the peace, after the justice has notified him that a writ of *certiorari* has been issued, and commanded him to stay all proceedings upon the execution, is liable for the value of the property. (*Spencer v. Long*, 39 Cal. 700.)

§ 355. **Quashing execution.** Upon the quashing of an execution, the officer is bound to return the property levied upon to the defendant unless he have

other writs in hand. In the case of *Wellington v. Sedgwick*, 12 Cal. 470, the defendant, as sheriff, having an execution against Stevens & Markley, levied it upon certain goods, the property of Stevens & Markley, and placed them in the hands of Wellington, as keeper, and subsequently the execution was quashed, having been issued without seal; and between that time and the issue and levy of a new execution, Wellington, who still remained in possession of the goods, purchased the goods of Stevens & Markley. The court held that such purchase was valid, and vested the property in Wellington. Upon the levy of the execution, the property vested in the sheriff for certain purposes; his title was only a qualified title, which was defeated by the quashing of the execution. The title then returned to Stevens & Markley; they could discharge the sheriff from the duty of returning the property to them, which they did by the sale to Wellington.

§ 356. **How writ is executed.** "The sheriff must execute the writ against the property of the judgment debtor, by levying on a sufficient amount of property, if there be sufficient, collecting or selling the things in action, and selling the other property, and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment. Any excess in the proceeds over the judgment and accruing costs must be returned to the judgment debtor, unless otherwise directed by the judgment or order of the court. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs within the view of the sheriff, he must levy only on such parts of the property as

the judgment debtor may indicate, if the property indicated be amply sufficient to satisfy the judgment and costs." (*California. Code Civ. Proc., sec. 691. See, also, sec. 349, ante.*)

§ 357. **Levy of execution in California.** The levy of the writ of execution is made in the same manner as the levy of a writ of attachment. (*Code Civ. Proc., secs. 542, 688.*) The code provisions as to the manner of making levy are to be found in sections 372-394 of this work. "If property of the judgment debtor has already been attached in the same action, the sheriff must satisfy the execution out of the property attached by him which has not been delivered to the defendant, or a claimant thereto, or subjected to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for that purpose.

"1. By paying the plaintiff the proceeds of all sales of perishable property sold by him, or any debts or credits collected by him, or so much as shall be necessary to satisfy the judgment.

"2. If any balance remain due, and an execution shall have been issued on the judgment, he must sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands. Notices of the sales must be given, and the sales conducted as in other cases of sales on execution." (*Code Civ. Proc., sec. 550.*)

If personal property is already held under attachment, the levy of the execution is made by indorsing upon the writ the time of its receipt and a memorandum or certificate of the fact of levy upon the attached property.

§ 358. **Return of writ.** An execution should not be returned until the return day indicated in the writ, except upon written instructions from the plaintiff or plaintiff's attorney. An officer's return on process of every kind should state that he has performed what the mandatory part of the process requires of him. It should be a report of his proceedings, and should contain a statement of the acts which he has done under and by virtue of it, and the place and the time when and where they were done. The office is merely ministerial. Hence it is insufficient for him to return that he has duly or legally served the process committed to him. The time for its return does not therefore commence to run until it has been indorsed "received." In California the execution may be made returnable, at any time not less than ten nor more than sixty days after its receipt by the sheriff, to the clerk with whom the judgment-roll is filed. (*Code Civ. Proc.*, sec. 683.)

§ 359. **Necessity of prompt return.** The sheriff is liable on his bond if he fails to return an order of sale, whereby the plaintiff loses his debt by reason of failure to procure entry of a deficiency judgment. (*See, also, sec. 360, post.*)

§ 360. **Proper filing of return.** Care should be taken by the sheriff to see that his return is properly filed by the clerk; for if the judgment creditor loses his debt by not procuring deficiency judgment, no presumptions are indulged in favor of the sheriff, if the return be subsequently found in the clerk's office without indorsement of filing. (*Boyd v. Desmond*, 79 Cal. 250, 21 Pac. 755.)

§ 361. **Return — Time suspended by injunction.** An order made by a court of competent jurisdiction, staying the sheriff from interference with the property of a judgment debtor suspends, during its continuance, the running of the statutory period for executing the process. (*Ansonia Brass and Copper Co. v. Connor*, 103 N. Y. 502, 9 N. E. 238.)

§ 362. **Stay of proceedings extends time.** When a stay of proceedings is ordered, the time of the stay is not to be computed as part of the time in which the writ runs to the return day. That is, if a writ is made returnable within sixty days, and a stay of proceedings is granted for twenty days, the writ will have eighty days to run before it must be returned.

§ 363. **Return in foreclosure cases.** An order of sale in foreclosure, either by certified copy of the decree or by writ issued by the clerk of the court, is not an execution within the meaning of a provision requiring the return of execution within a certain period; and if the writ contain such a direction, it is of no effect, and a sale made after the time mentioned is valid. (*Southern Cal. L. Co. v. Hotel Co.*, 94 Cal. 217, 28 Am. St. Rep. 115, 29 Pac. 627.)

§ 364. **Foreclosure of mortgage and other liens.** In California a valid mortgage or mechanics' lien existing upon property of the insolvent debtor at the time of filing the petition may be foreclosed by leave of the insolvency court, and the property may be sold on execution sale, the mortgagee, however, being required to waive all claim upon the other assets of the insolvent debtor. (*Insolvent Act of 1880*, sec. 44;

Montgomery v. Merrill, 62 Cal. 385; *Bradford v. Dorsey*, 63 Cal. 122.)

§ 365. **Execution against a corporation for fine.** "When a fine is imposed upon a corporation on conviction, it may be collected by virtue of the order imposing it, by the sheriff of the county, out of its real and personal property, in the same manner as upon an execution in a civil action." (*California. Pen. Code, sec. 1397.*)

§ 366. **Justice's court executions.** In California execution for the enforcement of a judgment of a justice's court may be issued at any time within five years from the entry of judgment. It must be directed to the sheriff or to a constable of the county, and must be subscribed by the justice, and bear date the day of its delivery to the officer. At the request of the judgment creditor, the writ may be renewed before the expiration of time fixed for its return, by the word "renewed" written thereon, with the date thereof, and subscribed by the justice. Such renewal has the effect of an original issue, and may be repeated as often as necessary. (*California. Code Civ. Proc., secs. 901-903.*)

The filing and docketing of a transcript of a judgment rendered by a justice of the peace in the office of the clerk of the county does not empower the clerk of the court in which it is filed and docketed to issue an execution on the same after five years have elapsed from the date of its rendition. (*Kerns v. Graves*, 26 Cal. 156.)

With reference to property in the same county, the provisions for the enforcement of an execution upon

a judgment in a justice's court are the same as those relating to courts of record.

§ 367. **Power of justice over his judgments.** A justice of the peace has power to recall an execution issued by him on a void judgment, and stay further proceedings, even if the judgment has been docketed in the office of the county clerk and the execution has been issued by the clerk. (*Gates v. Lane*, 49 Cal. 266.)

§ 368. **Enjoining justice's judgment.** If a judgment rendered by a justice of the peace is void on its face, a suit in equity cannot be maintained to restrain its enforcement by execution, even if the execution is issued by the county clerk on a copy of the judgment docketed with him. (*Gates v. Lane*, 49 Cal. 266.)

§ 369. **Execution to constable—Levy by sheriff.** The fact that an execution issued to a constable was served by the sheriff does not render the service void where it might have been issued to either the sheriff or constable. (*Ross v. Wellman*, 102 Cal. 1, 36 Pac. 402.)

§ 370. **Setting aside a justice's court execution.** Where plaintiff seeks to enjoin a sale of personal property, under an execution issued upon a judgment recovered against him in a justice's court, on the ground that the summons was never served on him, and therefore that the justice never acquired jurisdiction of his person: *Held*, that plaintiff's remedy is by motion in the justice's court to set aside the execution.. (*Comstock v. Clemens*, 19 Cal. 77.)

§ 371. **Stay of justice's court execution.** The court, or any justice thereof, may stay the execution of any judgment, including any judgment in a case of forcible entry or unlawful detainer, for a period not exceeding ten days. (*In effect June 14, 1906.*)

CHAPTER XIV.

EXECUTION—PERSONAL PROPERTY.

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- § 391. Priority of partnership creditors.
- § 392. Harvested grain crop—Different owners.
- § 393. Partnership—Sale or dissolution.
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§ 372. **Levy, how made.** The manner of making the levy of the writ of execution is the same as upon levy of attachment. The California Code of Civil Procedure (*sec.* 688) provides that "shares and interest in any corporation or company, and debts and credits, and all other property, both real and personal, or any interest in either real or personal

property, and all other property not capable of manual delivery, may be attached on execution, in like manner as upon writs of attachment. Gold dust must be returned by the officer as so much money collected, at its current value, without exposing the same to sale. Until a levy, property is not affected by the execution." In Colorado execution binds the personal property of the defendant as soon as the writ comes to the sheriff's hands. (*As to manner of levying attachment, see chapters X and XII, ante.*)

§ 373. **Entry into buildings.** An execution will not justify breaking into a house. But after entrance has been lawfully effected through an outside door the officer may, for the purpose of levying upon property, break through inside doors to get at the property.

§ 374. **Expense of keeping property levied upon.** The sheriff is allowed his necessary expenses in keeping and preserving property seized on attachment or execution, the amount to be fixed by the court and paid out of the fees collected in the action. (*California. Stats. 1893, p. 507.*)

§ 375. **Inventory of property.** A special inventory of the articles to be sold should be prepared, so that confusion may be avoided when the sale takes place. A large stock of goods sold in parcels cannot well be disposed of at a public sale where there are many bidders present without such an inventory and prearranged method of conducting the sale. (*See, also, sec. 301, ante.*)

§ 376. **Notice of sale.** No sale should be held except after the statutory notice has been given, which in California is by posting written (or printed) notice of the time and place of sale in three public places in the township or city where the sale is to take place, for not less than five nor more than ten days. The notices must state the kind of money or currency in which bids may be made at such sale, which must be the same as that specified in the judgment. If the writ does not specify in the judgment the kind of money, the sale should be made for "lawful money of the United States."

§ 377. **Levy upon judgments.** The method of levying upon a judgment is so clearly and authoritatively pointed out in the decision of the supreme court of the state of California, in the case of *McBride v. Fallon*, 65 Cal. 301, 4 Pac. 17, that the portion of that decision relating thereto is herewith quoted.

Two cross-judgments existed between the parties. One party took out an execution on the judgment in his favor, and caused it to be levied on the judgment against him, which was subsequently sold for a nominal sum. The plaintiff in whose favor the judgment so levied upon and sold was entered moved the court, after said sale, that execution issue thereon. The motion was granted, and from that order the appeal was taken. In deciding the case the supreme court say: "We are clearly of opinion that a judgment cannot, in any case, be levied on and sold under execution as the judgment in this case was. After enumerating the kinds of property of a judgment debtor liable to execution, the code provides that 'shares and

interests in any corporation or company and *debts* and *credits* . . . and all other property not capable of manual delivery, may be attached on execution in like manner as upon writs of attachment.' (*Code Civ. Proc.*, sec. 688.)

" 'Debts and credits, and property not capable of manual delivery, must be attached' in the mode pointed out in subdivision 5, section 542, Code Civil Procedure, that is, 'by leaving with the person owing such debts, or having in his possession or under his control such credits and other personal property, or with his agent, a copy of the writ and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession or under his control, belonging to the defendant, are attached in pursuance of such writ.'

"The fact that a debt is evidenced by a judgment does not, in our opinion, make it anything more or less than a debt, or more capable of manual delivery than it would be if not so evidenced. No provision is made for attaching or levying on *evidences* of debt. It is the debt itself which may be attached by writ of attachment, or 'on execution in like manner as upon writs of attachment.' This we think to be the meaning of the code, and the mode prescribed by it is exclusive." (*Code Civ. Proc.*, secs. 4, 18.)

In the later case of *Dore v. Dougherty*, 72 Cal. 232, 1 Am. St. Rep. 48, 13 Pac. 144, the court say: "It is claimed that the judgment was not subject to levy and sale under execution. We think this point well taken. It was expressly so held in *McBride v. Fallon*, 65 Cal. 301, 4 Pac. 17. . . . It is claimed that the case of *McBride v. Fallon*, *supra*, only holds that the sale could not be made as it was attempted

in that case, and that the mode of levy there was different from the mode pursued here. But that ruling is expressly placed on the ground that the judgment is but the evidence of the debt, and that the statute has made no provision for attaching or levying upon evidences of debt, but that it is the debt itself, and not the evidence of it, which may be levied upon by the writ of attachment, or on execution in like manner as upon writs of attachment." These cases have also been cited with approval in the more recent case of *Latham v. Blake*, 77 Cal. 646, 18 Pac. 150, 20 Pac. 417.

§ 378. **Indebtedness evidenced by a promissory note.** In *Davis v. Mitchell*, 34 Cal. 81, it was held that a sheriff might, under an execution and sale, levy on a promissory note belonging to the judgment debtor, and that the purchaser took it subject to any defense which the maker might have had against it, if the payee had retained it. Whether, in such case, the sale will be valid without a delivery of the note to the purchaser, is discussed in the decision, but not decided.

In the more recent case of *McBride v. Fallon*, 65 Cal. 301, 4 Pac. 17, (*see, also, sec. 377, ante*), the court, commenting upon that case, said: "In that case the sheriff had possession of the note, and delivered it to the purchaser. The court alluded to that circumstance without passing upon its materiality. The case arose and was decided before the enactment of the code, which, while it does not prescribe a mode of proceeding in such cases materially different from that pointed out by the late Practice Act, makes that mode exclusive. But, independently of that circum-

stance, we could not, with our present views, assent to the doctrine of that case." The code provisions referred to will be found in sections 230 and 372, *ante*.

§ 379. **Certain corporation stock not subject to execution.** Stock of a corporation, purchased by it at a sale for delinquent assessments under statutory provisions, cannot be levied on under an execution against the corporation. (*Robinson v. Spaulding G. and S. Mfg. Co.*, 72 Cal. 32, 13 Pac. 65.)

§ 380. **Property held as security not subject to execution.** A, being indebted to B, delivered to him a quantity of lumber as security for payment of the debt, with the understanding that B should proceed and sell the lumber and pay his debt out of the proceeds. The lumber was afterward levied upon by the defendants under an execution in their favor against A as his property: *Held*, that the lumber was not subject to seizure under an execution against A without payment, in the first place, of his indebtedness to B. (*Swanston & Taylor v. Sublette*, 1 Cal. 124.)

§ 381. **Property of the inhabitants not liable for county debts.** The private property of an inhabitant of a county is not liable to seizure and sale on execution for the satisfaction of a judgment recovered against the county. (*Emeric v. Gilman*, 10 Cal. 404, 70 Am. Dec. 742.)

§ 382. **Property in custody of law.** Property in the custody of the law is not liable to seizure, with-

out an order from the court having charge thereof. (*Yuba County v. Adams*, 7 Cal. 35. See, also, sec. 304 ante.)

§ 383. **Equitable claim not subject to execution.** The equitable claim of a vendee for return of part payments made by him on a purchase of land, as to which he is in default, is not subject to garnishment by his judgment creditor. (*Redondo Beach Co. v. Brewer*, 101 Cal. 322, 35 Pac. 896.)

§ 384. **Property of wife not liable for husband's debt.** The property of the wife cannot be taken under an execution against her husband. Section 8 of article XX of the constitution of California provides that all property, real and personal, owned by either husband or wife before marriage, or that acquired by either of them afterwards, by gift, devise, or descent, shall be their separate property; and section 168 of the Civil Code declares that the earnings of the wife are not liable for the debts of the husband.

§ 385. **Gift from husband to wife.** A transfer of personal property by gift from the husband to the wife creates separate property in the wife, and is valid as to all, except existing creditors and *bona fide* subsequent purchasers without notice. Such a transfer cannot be attacked as fraudulent and void as to subsequent creditors in an action for the recovery of the property by the wife against an officer who has seized it under execution, unless he proves not only the issuing of the execution, the levy, and that he was a creditor, but also the rendition of a judg-

ment upon his debt, and that the execution was issued upon the judgment.

In the case of *Kane v. Desmond*, 63 Cal. 464, "the defendant seized the piano in controversy from the possession of plaintiff, by an execution issued in favor of *A. L. Day v. Thomas Kane*, and sold it at execution sale as the property of Kane to satisfy the execution. Thomas Kane was the husband of plaintiff. On the trial of the case the court found that the plaintiff was, at the time of the seizure and sale, the sole and exclusive owner of the property, in her own right, and entitled to its possession, and that her husband had no right or title to it." In deciding the case the supreme court say:—

"The seizure of the property was therefore wrongful (*Wellman v. English*, 38 Cal. 583; *Lewis v. Johns*, 34 Cal. 629; *Van Pelt v. Little*, 14 Cal. 194), and the plaintiff was entitled to recover. But the finding is attacked as against the law and the evidence in this, that the evidence showed the plaintiff's claim of title to the property was founded on a gift from her husband, which was void as to his creditors. But it does not appear that the husband was indebted to any one at the time of the gift, except to the person from whom he had rented the piano under an agreement to purchase it on the installment plan. Being free from debt the husband had the right to transfer his interest in the property to his wife by gift, and the wife, under the law, had the capacity to take and hold it in her own name and right. (*Dow v. Gould & Curry S. M. Co.*, 31 Cal. 629; *Woods v. Whitney*, 42 Cal. 358; *Higgings v. Higgings*, 46 Cal. 259; *Peck v. Brummagim*, 31 Cal. 440, 89 Am. Dec. 195.) The gift was complete, for the evidence tended

to show that immediately after the husband had rented the piano under the agreement to purchase, he delivered it to his wife as a gift, and she accepted it, and used it continuously as her separate property until the time of the seizure. Now, this transfer by gift was valid and effectual between herself and her husband and all the world, except existing creditors and *bona fide* subsequent purchasers without notice. There was no proof that Day—the execution creditor—was a creditor of the husband at the time of the gift, and there is no presumption that the gift was void as to him as a subsequent creditor.” (*Wells v. Stout*, 9 Cal. 479; *Hussey v. Castle*, 41 Cal. 239.)

§ 386. **Personal privilege or right—How sold.** A mere personal privilege, license, or right, such as a patent or a seat in a stock and exchange board, is not property which may be sold upon execution. Upon proceedings supplementary to execution, however, the debtor may be ordered to assign it to a receiver, named and appointed in the order, and empowered to sell the same to satisfy the judgment. (*Habenicht v. Lissak*, 78 Cal. 351, 20 Pac. 874; *Pacific Bank v. Robinson*, 57 Cal. 520, 40 Am. Rep. 120; *Lowenberg v. Greenebaum*, 99 Cal. 162, 13 Pac. 794.) The following cases also hold a seat in a stock and exchange board to be property subject to sale under execution proceedings. (*Hyde v. Wood*, 94 U. S. 523, 24 L. ed. 264; *Powell v. Waldron*, 89 N. Y. 328, 42 Am. Rep. 301; *In re Ketchum*, 1 Fed. Rep. 840 (N. Y.); *In re Werder* (N. J.), 15 Fed. Rep. 789); while, on the contrary, such a seat has been held to be a mere personal privilege incapable of forced sale in *Thompson v. Adams*, 93 Pa. St. 55,

66; *Barclay v. Smith*, 107 Ill. 357, 47 Am. Rep. 437, 122 Am. Law Reg. 435, and *In re Sutherland*, 6 Bissell, 526 (Ill.), Fed. Cas. No. 13637.

§ 387. **Franchise not liable to execution sale.** A franchise is not property capable of manual delivery, and cannot be levied upon and sold under execution unless there be a statutory provision expressly authorizing the sale; and when such provision exists, the extent as well as the mode of levy and sale are limited thereby. A statute authorizing execution sale of the franchise of a corporation does not authorize the sale of the franchise owned by a private individual. A provision in a judgment requiring the defendant to deliver possession of a franchise is not susceptible of execution. (*Gregory v. Blanchard*, 98 Cal. 311, 33 Pac. 199.)

§ 388. **Personal property mortgaged, pledged, etc.** When an officer is directed to levy execution upon personal property which, under the California code provision (*Civ. Code, sec. 2955*), may be subject to mortgage of record without change of possession, he should endeavor to ascertain if it has been mortgaged, as in such case it cannot be taken without payment or tender of the amount of the mortgage debt. (*California. Civ. Code, secs. 2968-2970.*) The same rules apply to levy of execution upon personal property mortgaged, pledged, or held for liens, as in case of levy of attachment, which subject is treated in a preceding chapter. (*Secs. 283-289, ante.*)

§ 389. **Claim by third party.** Where property levied upon under execution to satisfy a judgment

for the payment of money is claimed in whole or in part by a person, corporation, partnership, or association other than the judgment debtor, such claimant may give an undertaking as herein provided, which undertaking shall release the property in the undertaking described from the lien and levy of such execution. (*California. Code Civ. Proc., sec. 710 et seq.*)

§ 390. **Levy on partnership or joint property.** The interest of one partner in the partnership chattels is the subject of levy and sale by the sheriff on an execution against one of the partners; and, in order to effect a sale, he may take possession of the entire property upon levy of either execution or attachment. He can only levy upon and sell the interest and right therein of the partner sued, subject to the prior rights and liens of the other partners and the joint creditors therein. And the same is equally true in case of personal property owned by two or more persons in common. (*Veatch v. Adams*, 51 Cal. 609; *Clark v. Cushing*, 52 Cal. 617; *Robinson v. Tevis*, 38 Cal. 611; *Sheehy v. Graves*, 58 Cal. 449; *Jones v. Thompson*, 12 Cal. 199.) In the case last mentioned the court said:—

“The interest of one partner in partnership property is such an estate under our statute as may be sold for his debts; it is a legal estate in chattels. It is true that as between the partners, the interest of each is only the residuum of the property left after the settlement of the firm debts; and that the rights of the firm creditors and the several partners are paramount to the claims of separate creditors of the firm. But this interest of the partner thus defined

is held by the weight of authority subject to levy for his debts. Story on Partnerships, section 263, thus states the rule: 'In cases of this sort, therefore, the real position of the parties, relatively to each other, seems to be this: The partnership property may be taken in execution upon a separate judgment and execution against one partner; but the sheriff can only seize and sell the interest and right of the judgment partner therein, subject to the prior rights and liens of the other partners and the joint creditors therein. By such seizure the sheriff acquires a special property in the goods seized; and the judgment creditor himself may, and the sheriff also, with the consent of the judgment creditor, file a bill against the other partners, for the ascertainment of the quantity of that interest, before any sale is actually made under the execution. The judgment creditor, however, is not bound, if he does not choose, to wait until such interest is so ascertained, but he may require the sheriff to proceed to a sale, which order the sheriff is bound by law to obey. In the event of a sale, the purchaser at the sale is substituted to the rights of the execution partner, *quoad* the property sold, and becomes a tenant in common thereof; and he may file a bill, or a bill may be filed against him by the other partners, to ascertain the quantity of interest which he has acquired by the sale.' "

In *Waldman v. Broder*, 10 Cal. 378, certain personal property belonging to Waldman and one Franck had been seized by Broder, as sheriff, by virtue of an execution in his hands against the property of Franck; and Waldman, who was a co-tenant of Franck, having brought his action in replevin against the sheriff, the district court instructed the jury to the effect that if Waldman and Franck were

owners of the property as partners or joint owners of it in any other capacity, the plaintiff, Waldman, could not recover; and the jury having found a verdict for the defendant, it was held by the supreme court that the instruction was correct, the court observing that "if the defendant, as sheriff, levied on the property while it was the joint property of plaintiff and Franck (against the latter of whom he had an execution), this is a justification. He had a right to levy on it, and take it into possession for the purpose of subjecting it to sale."

The case of *Waldman v. Broder* was afterwards cited and approved, the language of Mr. Chief Justice Field, who delivered the opinion of the court, being as follows: "Vasquez and the plaintiffs were tenants in common of the grain, and in attaching the interest of one of them, the sheriff was justified in taking and detaining the possession of the entire quantity, though he will not be authorized to sell under the execution on the judgment which may be recovered in that action anything but the undivided one-third interest of Vasquez. The purchaser at the sale and the plaintiff will then be tenants in common of the property." (*Bernal v. Hovious*, 17 Cal. 541, 79 Am. Dec. 147.)

§ 391. **Priority of partnership creditors.** It has been frequently decided by the courts that the creditors of a partnership are entitled to preference over the creditors of the individual partners in the payment of their debts out of the partnership property, or moneys arising therefrom, without regard to the priority of attachment liens. (*Chase v. Steel*, 9 Cal. 64; *Conroy v. Woods*, 13 Cal. 626, 73 Am. Dec. 605;

Dupuy v. Leavenworth, 17 Cal. 262; *Burpee v. Bunn*, 22 Cal. 194; *Bullock v. Hubbard*, 23 Cal. 501, 83 Am. Dec. 130; *Commercial Bank v. Mitchell*, 58 Cal. 42.) And the same principle applies as between the creditors of several partnership firms.

In the case of *Bullock v. Hubbard*, above cited, Bishop & Long were partners. Bishop & Long as a partnership was also a member of two other firms—Bishop, Long & Steuart, and Bishop, Long, Siefert & Dodsworth. The firms all failed, and their property was attached by creditors. The creditors of Bishop, Long & Steuart, and Bishop, Long, Siefert & Dodsworth obtained the first attachments, and placed them in the hands of the sheriff, before the creditors of Bishop & Long placed theirs in his hands. The sheriff levied all the writs on the property in the order in which they were placed in his hands. The sheriff had in his hands a sum of money received from the sale of the property of Bishop & Long, to apply on the executions issued on judgments rendered in the actions. None of the others, as partnership firms, had any interest in this money. The sheriff commenced an action requiring the creditors to litigate their respective rights to the money. The court below held, and the supreme court affirmed the judgment, that the creditors of the firm of Bishop & Long were entitled to the money realized from the sale in the order of the priority of their several attachment liens.

In *Burpee v. Bunn*, 22 Cal. 194, a separate creditor of one of several partners levied an attachment for his debt upon the partnership property, and afterwards made an agreement with a trustee, to whom his debtor had conveyed the property, by which the

latter stipulated to pay the attachment debt from the proceeds of a sale of the property, after paying expenses and prior claims. *Held*, that neither by his attachment nor by the agreement, did the separate creditor acquire any title to or lien upon the property as against the superior equity of a subsequently attaching creditor of the partnership.

Where one partner buys out his co-partners, agreeing to pay the debts of the firm, the partnership property remains bound for firm debts, just as before the sale. The lien of firm creditors attaching must be preferred to the lien of an individual creditor of the remaining partner attaching first. A lien by attachment enables a creditor to file a creditor's bill, without waiting for judgment and execution. Partners may make a *bona fide* sale of their property any time before their creditors acquire a lien; but such sale cannot include a sale directly or indirectly to one of the partners, with a stipulation that he will pay the firm debts, there having been no credit given by the individual creditor on the strength of an apparent sole ownership in the vendee. The fact that an individual creditor obtains judgment, issues execution and levies on firm property, gives him no right to the property as against firm creditors who have not yet obtained judgment. In such cases of conflict between the individual and firm creditors, equity has jurisdiction. No action lies against the sheriff for levying the execution of the individual creditor, and a sale to different purchasers might result in a loss of the property. (*Conroy v. Woods*, 13 Cal. 626, 73 Am. Dec. 605.)

In *Commercial Bank v. Mitchell*, 58 Cal. 42, an action against the members of a partnership, upon a

joint and several promissory note, signed by them individually, but not with the firm name, attachment was issued and levied upon the interests of defendants in the partnership property, upon which an attachment previously had been and others were subsequently levied in actions against the firm. Subsequently, the plaintiff amended his complaint by alleging the partnership of the defendants, and that the note was a partnership debt; but the action still ran against the defendants as individuals, and judgment was entered against them in that capacity. Judgments having been entered in all the cases, the property was sold under execution in one of the cases against the firm, and the proceeds applied in satisfaction of that execution and another in a similar case: *Held*, that the money was properly applied on the executions against the firm in preference to those of the plaintiff.

§ 392. **Harvested grain crop—Different owners.** Some of the questions relating to the duties of sheriffs in levying upon a harvested crop of grain, part of which is partnership property, and a part belonging to a stranger to the writ, and upon a portion of which there is a chattel mortgage, are plainly elucidated in the opinion of the court in the case of *Sheehy v. Graves*, 58 Cal. 449. In that case Finch and Shinn were partners in a crop, and the latter mortgaged his interest and took possession of the whole crop. Afterwards, in an action by the plaintiff against Finch & Shinn, an attachment was levied upon the crop by the defendant as sheriff. In an action against the defendant for failure to make the money on an execution out of the property attached, the court found

that it was agreed between the plaintiff, defendant, and mortgagee that the latter should thresh and sack the grain, and that whatever should belong to the Shinn interest should be delivered to the defendant upon the plaintiff's attachment. The mortgagee threshed and sold the grain and paid to the defendant three hundred and nineteen dollars as the part belonging to Shinn, and this was applied on the execution, leaving a balance still due. Upon an appeal from a judgment for the defendant: *Held*, that under the facts found it was the duty of the sheriff to take possession of the Shinn interest after it was threshed and sacked, and to sell it in the manner required by law; and that he had no right to sell at private sale, or authorized another to do so; and that therefore the decision was against law, and the judgment should be reversed upon the findings.

In deciding the case the court say: "The case demands some other observations. If the crop raised on the Sheehy place was partnership property, what right had Jackson to take possession of it to the exclusion of Shinn, the partner from whom he had no mortgage? As against Jackson, who had a mortgage only of the interest of Finch, which interest could only be determined after a settlement of the accounts of the partnership, where it might have turned out that Shinn was entitled to the whole (*Civ. Code, sec. 2405*), Shinn had a right to the possession, and under these circumstances it was the duty of the sheriff, having in his hands the execution against both partners, to take possession of all the grain on the Sheehy place. Shinn could not be deprived of the possession of the whole by the assignment by his partner of his interest. The sheriff neglected his duty and was

guilty of a breach of his bond as set forth in the complaint in not taking possession of the whole grain, at least on the Sheehy place, as he was ordered to do."

§ 393. **Partnership—Sale or dissolution.** Where one partner *bona fide* sold the partnership property to satisfy his individual indebtedness, and in an action of replevin by the purchaser against a creditor of the firm who has attached the property, after the sale and delivery, as the firm property, and for a firm debt, the court properly rendered a judgment for the purchaser; and it will be presumed in support of the judgment that the court below found it as a fact that the other partner consented to and authorized the sale. So long as the legal title of the partnership property remains in the co-partners, a creditor of the firm may pursue his remedy against it in an action at law in the same manner as against an individual debtor. But if the legal title has been conveyed to a third person *bona fide*, the creditor can pursue the property only by a bill in equity to marshal the assets and enforce his equitable lien. (*Stokes v. Stevens*, 40 Cal. 391.)

The filing of a bill by one partner against his co-partners for a dissolution and account, and praying for an injunction and receiver, and an appointment of a receiver by the court, does not prevent a creditor from proceeding by attachment, and gaining a priority over other creditors, until a final decree of dissolution and order of distribution. Funds in the hands of a receiver, in a suit for dissolution, are therefore subject to levy at any time before a final decree of dissolution and distribution. (*Adams v. Woods*, 9 Cal. 24.)

§ 394. **Release of execution.** Upon order of the plaintiff's attorney, or upon payment to the officer of the amount due on the execution, including costs accrued, the sheriff should release the property.

When property has been seized upon execution and an appeal has been taken and the stay-bond filed, which by statute "stays all further proceedings and releases property levied upon," the sheriff should release at once without waiting for justification of sureties or waiver of the same. (*Sam Yuen v. McMann*, 99 Cal. 497, 34 Pac. 80.)

If, after an execution has been levied on sufficient property to satisfy the judgment, the court orders that the judgment be not enforced, the order releases the levy, and it will not have the effect of satisfying the judgment. (*Mulford v. Estudillo*, 32 Cal. 132.)

CHAPTER XV.

EXECUTIONS—REAL PROPERTY.

- § 395. Levy upon real property.
- § 396. Real property—Interests subject to sale.
- § 397. Equity of redemption subject to sale.
- § 398. Interest of purchaser at judicial sale subject to sale.
- § 399. Interest of grantor after trust-deed made.
- § 400. Mining claim liable to execution.
- § 401. When owner is estopped from asserting title.
- § 402. Levy upon larger tract including debtor's land.

§ 395. **Levy upon real property.** In levying upon real property, the same method is followed as under the writ of attachment. Section 688 of the California Code of Civil Procedure provides that all property, "both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery, may be levied upon or released from levy in like manner as like property may be attached or released from attachment."

§ 396. **Real property — Interests subject to sale.** As the term "real property" is coextensive with lands, tenements, and hereditaments (*California. Civ. Code, sec. 14, subd. 5*), and the term "land" embraces all titles, legal or equitable, perfect or imperfect, including such rights as lie in contract—executory as well as executed—any interest whatever in land, legal or equitable, is subject to attachment or execution levy and sale. (*Fish v. Fowlie, 58 Cal. 373.*)

The interest of a person who holds a contract to purchase land may therefore be levied upon and sold. The officer levies upon the interest of the debtor in the property. If it turn out that the debtor had no interest therein, no property is acquired thereby. The notice of levy, notice of sale, the certificate of sale given to the purchaser, and the deed which follows after the expiration of the time for redemption, should recite that it is the interest of the debtor which is affected by the several proceedings. (*See, also, sec. 585, post.*)

§ 397. **Equity of redemption subject to sale.** The interest of a judgment debtor whose land has been sold at execution sale, the time for redemption not having expired may be subjected to execution sale. (*McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655.)

§ 398. **Interest of purchaser at judicial sale subject to sale.** "After the expiration of the time of redemption, and before execution of the sheriff's deed, the purchaser has an estate which is subject to be seized and sold. Upon the same principle, we can perceive no good reason why the interest of the purchaser may not also be seized and sold before the expiration of the time for redemption." (*Page v. Rogers*, 31 Cal. 305.)

§ 399. **Interest of grantor after trust-deed made.** If a deed of trust leaves an interest in the trust property in the grantor, such interest may be sold on an execution against him. (*Kennedy v. Nunan*, 52 Cal. 326.)

§ 400. **Mining claim liable to execution.** The interest of a miner in his mining claim is property, and may be taken and sold under execution. (*McKeon v. Bisbee*, 9 Cal. 137, 70 Am. Dec. 642.)

§ 401. **When owner is estopped from asserting title.** It is a well-settled rule of all courts of equity that the owner of land who stands by and sees another sell it without making known his claim is forever estopped from setting up his title against an innocent purchaser. In strict analogy to this rule it is also a familiar principle that one who knowingly and silently permits another to expend money on land, under a mistaken impression that he has title, will not be permitted to set up his right. (*Godeffroy v. Caldwell*, 2 Cal. 492, 56 Am. Dec. 360.)

§ 402. **Levy upon larger tract including debtor's land.** When the judgment debtor has or claims an interest in only a small, well-defined parcel of a much larger tract of land, it is extremely irregular, to say the least, to levy the execution on his interest in the general tract instead of the particular parcel he claims. Upon an irregular levy of this character, and a threatened sale under it, the owner in possession of the larger tract might perhaps be entitled to enjoin the sale, except of the smaller parcel claimed by the judgment debtor. (*Logan v. Hale*, 42 Cal. 645.)

CHAPTER XVI.

EXEMPTIONS FROM EXECUTION.

- § 403. Exemptions, generally.
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- § 407. Exempt property may not be attached.
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- § 462. When a stallion is not exempt.
- § 463. Multiplying employments.
- § 464. Exemption of officers' salary after expiration of his term.
- § 465. Cloth for clothing exempt.
- § 466. A watch is wearing apparel.
- § 467. Goods not exempt for money loaned for purchase price.

§ 403. **Exemptions generally.** In all the states and territories to which this work is particularly applicable, provision is made for the exemption from forced sale of a certain amount of personal property,

consisting substantially of those articles without which the debtor would be unable to live and earn necessary support for himself and family. Statutory provision is also usually made for the exemption of real property to a certain amount for the use of the debtor as a home.

Under the Trespass Law of 1907 (*Stats.* 1907, *p.* 999) no animal is exempt from attachment or execution, levy, and sale to satisfy a judgment that may be rendered against the owner of such animal for trespass committed by such animal.

§ 404. **Personal property exemptions.** Section 690 of the Code of Civil Procedure designates all the personal property that is exempt from execution. No article, however, mentioned therein is exempt from execution issued upon a judgment recovered for its price, or upon a judgment of foreclosure of a mortgage or other lien thereon. (*California. Stats.* 1907, *p.* 882.)

§ 405. **Liberal construction of statute.** The courts uniformly give to the statute of exemptions a liberal construction, as intended to enable the debtor to follow his vocation and earn a support for himself and family. (*In re McManus, Insolvent*, 87 *Cal.* 292, 22 *Am. St. Rep.* 250, 25 *Pac.* 413, 10 *L. R. A.* 567.)

§ 406. **Burden of proof.** The burden is on him who claims exemption of property under the statute to prove it. (*Murphy v. Harris*, 77 *Cal.* 194, 19 *Pac.* 377.)

§ 407. **Exempt property may not be attached.** In all these cases in which the property is declared to be "exempt from execution and forced sale," it is of course exempt also from attachment, the only purpose of the latter writ being to hold property in *statu quo* until judgment and execution can be had. (*See, also, sec. 315, ante.*)

§ 408. **Difficulties in determining exemptions.** Between the desire of the plaintiff to secure his debt, and the defendant to hold as much of his property as he can, the officer often finds himself perplexed as to how he can faithfully discharge his duty and do justice to both contestants. He should exercise the same sound discretion, as well as diligence, in securing property under the writ, as though he were in pursuit of a claim of his own.

In California section 690 of the Code of Civil Procedure (*sec. 404, ante*) declares what personal property shall be exempt from execution. In specifying the different kinds of property, it does not in every instance state the quantity that shall be exempt, and hence officers sometimes find themselves in a dilemma as to the limit to which they are bound to go. The law allows the judgment debtor to retain "necessary household, table and kitchen furniture." When certain household furniture was claimed as exempt from execution (*Haswell v. Parsons*, 15 Cal. 266, 76 Am. Dec. 480) the fact that the number of beds claimed—six in all—was greater than was required for the immediate and constant use of the family was held to be no objection. Plaintiff was a farmer, householder, and head of a family, having a wife and three children dwelling with him. The

court held that while it was possible that a less number of beds would have accommodated the plaintiff and his wife and children, yet it would be a very narrow construction of the statute to limit the exemption to the number required for immediate and constant use.

By the first and second subdivisions of section 690 of the Code of Civil Procedure there is exempted certain household furniture, wearing apparel, and provisions for three months for the use of the family. This exemption is for the benefit of all classes of judgment debtors, whatsoever may be their vocations, because these articles are essential to all families. By reference to the last sentence of subdivision 20 of section 690 it will be seen that household furniture and any other species of property mentioned in that section may be levied upon under execution (and attachment) issued for its price or purchase money thereof.

The next succeeding four subdivisions of the section were intended to exempt such articles as were used by the judgment debtor in earning a support for himself and family in his particular vocation. Hence the third subdivision exempts the farming implements of a farmer and two oxen or two horses or two mules and their harness, one cart or wagon, and food for such oxen, horses, or mules for one month, and all seed, grain, or vegetables actually provided, reserved, or on hand for the purpose of planting or sowing at any time within the ensuing six months, not exceeding in value the sum of two hundred dollars, etc. This exemption is to enable the judgment debtor to earn a support by farming, secures to him the means appropriate to that end, and is intended to

apply only to oxen, horses, or mules suitable and intended for the ordinary work conducted on a farm. (*Robert v. Adams*, 38 Cal. 383, 99 Am. Dec. 413.)

The provisions of the third subdivision of section 690 of the Code of Civil Procedure, with the exception of that exempting a horse and vehicle, relate exclusively to exemptions in favor of judgment debtors who are farmers. (*Robert v. Adams*, 38 Cal. 383, 99 Am. Dec. 413; *Murphy v. Harris*, 77 Cal. 194, 19 Pac. 377.)

The fourth subdivision exempts the tools or implements of a mechanic or artisan *necessary to carry on his trade*, the notarial seal, records, and office furniture of a notary public, the instruments and chests of a surgeon, physician, surveyor, or dentist, *necessary to the exercise of their profession*, with their professional libraries and necessary office furniture, etc.

The fifth subdivision exempts the cabin of a miner, his sluices, pipes, hose, windlass, derrick, cars, pump, tools, implements, and appliances *necessary for carrying on any mining operations*, etc. And here comes in the question as to what appliances may be exempt from execution as fixtures belonging to the realty, and not removable as personal property, and this question is treated upon elsewhere in this volume under the title of "Fixtures." (*Chap. XXI, post.*)

The sixth subdivision exempts two horses, two oxen, or two mules, and their harness, and one cart or wagon, one dray or truck, one coupe, one hack or carriage for one or two horses *by the use of which* they "or other laborer" habitually earns his living.

If an officer go upon a ranch or farm to levy upon the personal property of the debtor and find there,

of horses or other animals attachable, only the number that is specified by statute as exempt from execution, he will not be justified in refraining from levying upon them for that reason alone, for it may be that the debtor may have other property of a similar kind elsewhere. If it is in the officer's knowledge that the debtor has no other animals of that kind elsewhere, a levy upon those present that are by law exempt would be a superfluous proceeding. But if he has been directed by the plaintiff or his attorney to make the levy he should do so if they or either of them have reason to believe the debtor is not entitled to the exemption. He may require an indemnity bond if there be any doubt in his mind, and he will be protected by the bond.

Where the debtor has several horses, and two are exempt from execution, he may elect which shall be exempt; but if he has some not in the jurisdiction of the officer, and so beyond the reach of the execution, and there is only one within the reach of the execution, he cannot defeat the creditor's levy on that one by electing to keep it. Such a course would be using the statute, which was intended for beneficent purposes, as a means of evasion and fraud.

§ 409. **Claim by teamster.** Where two mules are claimed as exempt from forced sale on execution, it must be shown that the party claiming the mules habitually earned his living by the use of the animals in question, or that he is one of the persons mentioned in the statute. (*Calhoun v. Knight*, 10 Cal. 394.)

The wagon-sheet and driving-lines of a teamster are exempt "when useful and convenient to use" with

the horses expressly exempted by the statute. (*In re Bowman*, 83 Cal. 153, 23 Pac. 375. See, also, secs. 409, 410, 412, *post.*)

§ 410. **Teamster defined.** In the sense of the statute of exemptions one is a "teamster" who is engaged with his own team or teams in the business of teaming, viz., in the business of hauling freight for others for a consideration, by which he habitually supports himself and family, if he has one. While a teamster need not drive his team in person, yet he must be personally engaged in the business of teaming habitually, and for the purpose of making a living by that business. If a carpenter or other mechanic who occupies his time in labor at his trade purchase a team or teams and also carries on the business of teaming by the employment of others he does not thereby become a "teamster" in the sense of the statute. (*Brusie v. Griffith*, 34 Cal. 302, 91 Am. Dec. 695.)

§ 411. **Laborer defined.** By "other laborer," as used in the sixth subdivision of section 690 of the Code of Civil Procedure, is meant one who labors by and with the aid of his *team*, and not by the aid of a pick and shovel, or the implements of other trade or vocation. (*Brusie v. Griffith*, 34 Cal. 302, 91 Am. Dec. 695.)

§ 412. **Teamster or laborer.** Where B, who claimed two horses, etc., as exempt, was a clerk in a store at a stated salary, and had purchased said horses, etc., mainly to furnish employment for his son, who was seventeen years old, and by whom

exclusively the team was used habitually in hauling freight for said store and for other parties, and in delivering goods from said store to customers, all of which was done for the benefit of B and his family: *Held*, that B was neither a teamster nor other laborer in the statutory sense. (*Brusie v. Griffith*, 34 Cal. 302, 91 Am. Dec. 695.)

In the case of *Dove v. Nunan*, 62 Cal. 399, the property in controversy consisted of two horses and a wagon, which were claimed by the plaintiffs as exempt from execution. The court said: "The court below found that 'the plaintiffs were and are a firm doing business as coal dealers. . . . That the plaintiffs used the property sued for as teamsters. That they hauled coal and other commodities for others, for hire and pay, and received money therefor, all of which was expended in the support of plaintiffs and their families, all of whom resided in the same house and ate at the same table. That as coal dealers, and for the purpose of delivering coal at retail and in small quantities, the plaintiffs had and owned a smaller cart, truck or wagon, and one other horse. That the only use which the plaintiffs made of the wagon and horses—the subject of this suit—for themselves, other than as teamsters for pay, was in hauling coal and wood from plaintiffs' coal-yard, and other coal and wood-yards, to the place where the plaintiffs retailed the same, as above found herein.'

"The fact that the plaintiffs used the horses and wagon in question as teamsters for hire, and that they expended the money thus received in the support of themselves and their families, did not exempt the property from execution. In order to entitle a party to claim as exempt from execution two horses, etc.,

under the sixth subdivision of section 690, he must show that he is a cartman, drayman, truckman, huckster, peddler, teamster, or other laborer, *and that he habitually earns his living by the use of such horses, etc.*" (*Brusie v. Griffith*, 34 Cal. 302, 91 Am. Dec. 695. See, also, secs. 408-410, ante.)

§ 413. **Exemption of stallion.** In the case of *McCue v. Tunstead*, 65 Cal. 506, 4 Pac. 510, the supreme court says:—

"The court found in substance that the plaintiff was the owner and in the possession of a farm of about one hundred and fifty acres of land, which he cultivates for raising grain, etc., and that the horse which this action was brought to recover was used as a work-horse on said farm—sometimes singly and sometimes doubly. It is also found that the plaintiff is the publisher of a weekly newspaper and the proprietor of patent medicines, although his main reliance for support is upon his farm, 'and almost the entire income from that is from the services of said horse as a stallion and the agistment of mares for breeding to him.'

"The plaintiff is the owner of other horses pledged for a debt owing by him, and in the possession of the pledgee.

"In addition to 'the farming utensils or implements of husbandry of the judgment debtor,' the law exempts from execution *two horses*. (*Code Civil Procedure*, sec. 690, subdivision 3.) The findings establish beyond doubt that the plaintiff employed this horse in husbandry. He was a farm horse in the same sense that the plows, harrows and wagons used on the farm were utensils or implements of husbandry. Conced-

ing that some of the uses to which the horse was put were not strictly in the line of husbandry, he was, nevertheless, one of two horses owned by the judgment debtor, and employed by him in husbandry. The law does not specify how much or what use shall be made of 'the farming utensils or implements of husbandry,' or of the two horses exempted from execution. They are exempt because owned by a judgment debtor engaged in husbandry. And in order to make them exempt, it is not necessary that the owner of them should devote himself exclusively to husbandry. Such is not the language of the law. It does not say the farming utensils, etc., of a husbandman or farmer shall be exempt, but the farming utensils, etc., of husbandry; that is, utensils, etc., employed by the judgment debtor in husbandry or farming. This is the obvious meaning of the language, and we do not feel at liberty to hold that when a judgment debtor shows that he is carrying on a farm, and has but two horses which he uses in farming, that they are not exempt because he sometimes uses them for some other purposes. That would necessitate the importation of something into the law which it does not now contain."

In an earlier case it was also held that a stallion not used as a work-horse on a farm, but kept for the service of mares, is not exempt from execution. (*Briggs v. McCullough*, 36 Cal. 542.)

§ 414. **Tools and implements of trade — Construction.** When the statute exempts "tools and implements," the word "implement" is broader than the word "tool," and includes any instrument needed and used for the purpose of carrying on the trade

or business of the debtor. (*In re McManus*, 87 Cal. 292, 22 Am. St. Rep. 250, 25 Pac. 413, 10 L. R. A. 567.)

A turning lathe and appliances necessary to a mechanic and machinist in his business is exempt from execution. (*Matter of Robb*, 99 Cal. 202, 37 Am. St. Rep. 48, 33 Pac. 890.)

A jeweler's safe used in his business as a jeweler and watch-repairer is exempt from execution under the California statute. (*In re McManus, Insolvent*, 87 Cal. 292, 22 Am. St. Rep. 250, 25 Pac. 413, 10 L. R. A. 567.)

§ 415. **Steam thresher—When not exempt.** An expensive steam threshing-machine and outfit, owned in common by several farmers and used by them upon their own lands and also in doing work for others for hire, is not exempt as "farming utensils." (*In re Baldwin*, 71 Cal. 74, 12 Pac. 44.)

§ 416. **Threshing outfit.** Under section 690 of the Code of Civil Procedure a "combined harvester" is a farming utensil and an implement of husbandry, irrespective of its value, and if chiefly used for the farming purposes of a debtor, although occasionally used for others, is exempt from execution. (*In re Estate of Klemm*, 119 Cal. 41, 63 Am. St. Rep. 69, 50 Pac. 1062, 39 L. R. A. 340.) In this case the harvester cost \$1,500, but had depreciated in value by years of use. At the time of the above decision section 690 of the Code of Civil Procedure provided no limit as to value. Since then an amendment limits the value to "not exceeding the sum of \$1,000." The above decision also holds that "horse-rakes, gang-

plows, headers, threshing machines, and combined harvesters are as clearly implements of husbandry as are hand-rakes, single plows, sickles, cradles, flails, or an old-fashioned machine for winnowing."

But where a threshing machine with an expensive outfit was used chiefly in doing work for others for hire, it was held (*In re Baldwin*, 71 Cal. 74, 12 Pac. 44) that it was not exempt.

The statute exempting the farming utensils and implements of husbandry of the judgment debtor entitles him to retain as exempt a threshing outfit necessary to enable him to carry on his farming operations, though he also uses it in threshing for others. (*Spence v. Smith*, 121 Cal. 536, 66 Am. St. Rep. 62, 53 Pac. 653.) The court said: "Whether any property shall be exempt from execution, as well as the character and amount of property to be exempted, is purely a question of legislative policy; and, when the legislature has determined that the farming utensils and implements of husbandry of a judgment debtor shall be exempt, a court is not authorized to refuse the exemptions because, in its opinion, they are not necessary for the judgment debtor. The state has fixed no limit to the amount of land which a judgment debtor may cultivate by farming, and if the farming utensils which he has are necessary for the proper cultivation of his land, they are exempt from execution, irrespective of whether he would need them for cultivating a smaller tract. Section 690, subdivision 3, Code of Civil Procedure, provides that 'the farming utensils or implements of husbandry of the judgment debtor' are exempt from execution. The threshing outfit did not cease to be exempt from execution by reason of the fact that it

was usually the custom for the plaintiff to use it for hire to thresh the crops of others after doing his own threshing. At the time the property was seized it was in use by the plaintiff, and the court finds that all of it was necessary for his use in farming his land. In Baldwin's case, 71 Cal. 74, it was held that the legislature meant by the foregoing exemption such utensils or implements as are needed and used by the farmer in conducting his own farming operations; and in Stanton v. French, 91 Cal. 277, 25 Am. St. Rep. 174, 27 Pac. 657, it was held that the debtor is not required to use the exempt property exclusively in his customary vocation. It would be a hard rule upon the debtor to hold that, although the property was necessary for properly carrying on his farming, he would forfeit the exemption should he seek to earn something with it after he had ceased to need it for his own farming. A better suggestion would be that, if, in the opinion of the creditor, he is cultivating more land than he needs, he could satisfy his debt by levying his execution upon the land itself."

§ 417. **Provisions for family use.** That the courts incline to a very liberal construction of the exemption laws is evident in a recent decision by which it would seem that fire-wood actually provided for family use may be included as "provisions for family use." (*In re Bowman, Insolvent*, 83 Cal. 153, 23 Pac. 375.)

§ 418. **Salaries of officers, etc.** Moneys in the hands of federal, state, or county officers are exempt from execution or garnishment against a defendant to whom they may be due. (*Freeman on Executions*, sec. 132.)

§ 419. **Waiver of exemption by officer.** Although in California the law provides that "the earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution or attachment," may be claimed as exempt from execution, when such earnings are necessary for the use of his family, etc., there is recorded in *Sonoma Valley Bank v. Hill*, 59 Cal. 107, a case wherein a county officer's monthly salary was applied on an execution. It would seem, however, that in that case the auditor and treasurer must have been in sympathy with the judgment creditor, for otherwise the sheriff might easily have been frustrated in making the levy. And, even when the warrant for the debtor's salary came into the sheriff's hands, the sale thereof might have been prevented if the debtor had claimed his privilege of exemption. Instead of doing so, however, he allowed the sale to go on without protest, and received from the sheriff the overplus of the sale. The debtor subsequently made application for a writ of mandamus to the county treasurer, to compel him to issue another warrant for the salary, but the application was refused. Having had one warrant drawn and delivered to his lawfully constituted agent, the sheriff, and having obtained the benefit of the proceeds of the sale, by payment of judgments against him, he had not the right to have another warrant for the same services drawn and delivered to him and obtain double payment from the county. The court held that "the debtor must have known all the facts as to the levy, seizure and sale of the warrant by the sheriff, and his conduct was a ratification of the acts of the sheriff, though the warrant could not be levied on under a writ of execution."

The above construction of the exemption law secures—as the legislature intended it should—to the several classes mentioned, provision for earning their support.

§ 420. **Interest in common.** Personal property which is exempt from forced sale on execution is none the less exempt because the judgment debtor owns an undivided interest in it in common with a stranger to the judgment; and where a sheriff, on ascertaining that property which has been attached is exempt from execution, refuses to release it without an undertaking, he exceeds his authority and violates his duty. Such an undertaking is void for want of consideration, and for having been illegally exacted by the sheriff under color of his office. It is the duty of the sheriff to release exempt property, without an undertaking. (*Servanti v. Lusk*, 43 Cal. 238.)

§ 421. **Exemption a personal right.** The exemption of property from sale on execution is a personal right which the debtor may waive or claim at his election, and where the party fails to demand it, he thereby waives his privilege. (*Borland v. O'Neal*, 22 Cal. 504; *Gavitt v. Doub*, 23 Cal. 78.)

§ 422. **Debtor must claim within a reasonable time.** An execution debtor who has more horses than the number exempt by law may elect which he claims as exempt, but such election must be made and the officer notified thereof either at the time of the levy or within a reasonable time thereafter, or the right to elect will be deemed waived. (*Gavitt v. Doub*, 23 Cal. 78; *Stanton v. French*, 83 Cal. 194, 23 Pac. 355.)

§ 423. **Unreasonable delay in claiming exemption.** Where several horses owned by an execution debtor were levied upon, and no notice of claim of exemption was given to the officer until the day of sale, which was four months after the levy: *Held*, that the right of election had been lost by the unreasonable delay in exercising it, and that the officer was justified in selling the property. (*Borland v. O'Neal*, 22 Cal. 505.)

§ 424. **What constitutes a reasonable time.** The notice of claim should be promptly given by the debtor, in order that the officer may levy on other property, in the place of that selected, to secure the debt, if there is any. What will constitute a reasonable time will, therefore, depend upon the particular circumstances of each case. There may be cases where a notice of the selection given at any time before the sale would be sufficient, where it appears that no injury has been caused by the delay.

In a suit against plaintiff in execution for the value of household furniture sold thereunder, as being exempt, defendant offered to show that plaintiff agreed to place the property in the hands of a third person, to be sold for the benefit of defendant, the creditor: *Held*, that the evidence was not admissible, because such agreement does not necessarily waive the exemption from forced sale. (*Haswell v. Parsons*, 15 Cal. 267, 76 Am. Dec. 480.)

Where a party was absent in San Francisco at the time his furniture was sold on execution, on account of sickness in his family, it is a sufficient excuse for not claiming the exemption at the time, the defendant, plaintiff in execution, being aware of such claim,

it having been made on a previous seizure. (*Haswell v. Parsons*, 15 Cal. 266, 76 Am. Dec. 480.)

§ 425. **Sale after claim made.** A sheriff who levies upon and sells property exempt from execution is liable for the value of such property if claimed as exempt prior to the sale.

§ 426. **Claimant must notify officer.** The officer is under no obligation to hunt up the debtor in advance of the levy, in order to procure a selection by him. The debtor waives his right by failing to claim it; and a claim under one execution, when no sale was made under it, is not sufficient when the property is levied upon and sold under a subsequent execution.

§ 427. **Claim of exemption — How made.** The requirements of the debtor upon claim of exempt property by him differ in different states. In Arizona it is sufficient that he shall "designate" the property which he claims as exempt and "may point out the portions to be levied upon" (*Rev. Stats.* 1887, *sec.* 1957), while in Washington the debtor is required to deliver to the officer making the levy "a list by separate items of the property he claims as exempt." (*II Hill's Codes*, 1891, *sec.* 490.)

Unless the statute requires the claim to be in writing, however, as in the state named, or as in the case of claim for exemption of wages, it would seem that the claim of exemption may be made orally to the officer, and that he is bound to take notice of the claim thus made. Personal property plainly exempt, such as household furniture and the like, actually in use

by the debtor, should not be levied upon, even if not claimed as exempt.

When a debtor has more property of a particular kind than is exempt, and a writ is levied upon a portion, leaving as much as the law exempts, and thereafter the debtor claims a portion of the property levied upon, the residue being insufficient to satisfy the writ, the debtor, in order to make good his claim of exemption, must offer to surrender to the officer the other property of the same general kind, or so much as may be necessary to satisfy the writ. (*Keybers v. McComber*, 67 Cal. 395, 7 Pac. 838.)

§ 428. **Joint claim—Effect.** A notice of claim of exemption, signed by two persons is sufficient as a claim for either separately. (*Stanton v. French*, 83 Cal. 194, 23 Pac. 155.)

§ 429. **Priority of homestead over mortgage.** A declaration of homestead by the wife, after the execution but before the recording of a mortgage by the husband, prevents the enforcement of the mortgage against the property. (*First National Bank v. Bruce*, 94 Cal. 77, 29 Pac. 488.)

§ 430. **Grain on homestead land.** The fact that land is homesteaded does not of itself exempt from execution all the grain grown thereon. It would be giving a strained interpretation to the language of the third subdivision of section 690 of the Code of Civil Procedure (California) to say it was intended, *in addition* to all the crop grown upon the homestead, that the debtor should be secured seed grain to the value of \$200. It is obvious it is meant that only

grain to that amount shall be exempt. (*Horgan v. Amick*, 62 Cal. 401.)

In the case of *Dascey v. Harris*, 65 Cal. 357, 4 Pac. 404, an action in replevin, the following is the opinion of the court: "The wheat which is the subject of this action was grown on the homestead of plaintiffs. On the 15th of March, 1879, the plaintiff, John Dascey, filed his petition in insolvency, and such proceedings were had that on the 29th of April, 1879, he made an assignment of all his property, real and personal, to the defendant, assignee in insolvency. No property was specifically described in the assignment, but words of general description only were used. At the time of filing the petition, the premises constituting the homestead had been sown with wheat, which was then growing, and continued to be growing until after the assignment. Some time in August, 1879, after the wheat so raised on the premises had ripened, and been harvested, threshed and sacked by said John Dascey, the defendant, as assignee, under an order of the county court, seized the grain on the premises, and caused it to be removed therefrom. The wheat when so taken was of the value of \$1,267. It does not appear that evidence was given of any damage to plaintiffs besides the value of the wheat.

"At the time of the assignment the wheat in controversy had not such an existence as that it passed to the assignee. At that time the growing wheat was a part of the homestead, at least to the extent that a conveyance of the homestead would have passed the growing crop.

"Judgment reversed and cause remanded, with instructions to render judgment on the findings in

favor of plaintiffs for the possession of the property sued for; or in case a delivery cannot be had, for \$1,267, with interest thereon from the date of the seizure by defendant, and for costs."

§ 431. **Joint ownership in the property claimed.** Property owned jointly by husband and wife and habitually used by the husband alone in earning a living, cannot be by him claimed as wholly exempt as against an execution against both. (*Stanton v. French*, 83 Cal. 194, 23 Pac. 155.)

§ 432. **Partial use of building for hotel.** The use of a building partly, or even chiefly, for hotel purposes, for which the owner rents a portion, does not deprive him of his homestead exemption, if the building is and continues to be the *bona fide* residence of the family. (*Heathman v. Holmes*, 94 Cal. 291, 29 Pac. 404.)

§ 433. **How a homestead may be levied upon.** There is no lien of the judgment upon a homestead until the levy of an execution; and that levy creates no lien, except for the purpose of and as a foundation for instituting and carrying on proceedings to have an appraisal and sale under the statute. The homestead, no matter what may be its actual value, cannot be subjected to execution or forced sale, except in the manner pointed out by statute. (*California. Civ. Code, secs. 1241, 1245-1259.*)

§ 434. **Homestead insurance exempt.** If the wife declares a homestead on common property, and the husband procures a policy of insurance on the

house thereon, and the house is destroyed by fire, the sum due from the insurance company is not subject to garnishment by a judgment creditor of the husband. (*Houghton v. Lee*, 50 Cal. 101.)

§ 435. **When judgment is not a lien.** Where a homestead was declared after an attachment on the land and a judgment in a justice's court, but no abstract had been filed or recorded in the recorder's office, it was held (*Wilson v. Madison*, 58 Cal. 1) that at the time of the declaration of homestead the judgment did not constitute a lien upon the premises within section 1241 of the Civil Code, and a sale under the judgment conveyed no title.

§ 436. **Judgment no lien upon homestead.** A judgment cannot become a lien upon the homestead. It can become a lien only upon the real property of the judgment debtor, which is not exempt from execution. (*Bowman v. Norton*, 16 Cal. 214.)

§ 437. **Judgment after filing of homestead.** A judgment obtained after the filing of a declaration of homestead cannot be enforced against a homestead, although an attachment may have been levied upon the premises before the filing of the declaration. (*Sullivan v. Hendrickson*, 54 Cal. 258.)

§ 438. **Levy on homestead void.** The sheriff of Calaveras County was sued on his official bond for selling under execution against J. Kendall certain property claimed by plaintiff as a homestead. The supreme court decided in *Kendall v. Clark*, 10 Cal. 16, that no damage had or could result from such a

sale. If the property sold was a homestead the sheriff's deed conveyed nothing. The purchaser at such sale could acquire no right to the property, nor could the plaintiff suffer any injury.

§ 439. **Cloud on title of homestead.** The right of homestead having once attached, and not having been alienated, a deed from the sheriff under an execution against the husband would be a cloud upon the title and prevent the free alienation of the property by the husband and wife. (*Dunn v. Tozer*, 10 Cal. 167.)

Where a homestead is sold by the sheriff on an execution against the husband, or husband and wife, and a deed given to the purchaser therefor, it is a cloud upon the title, and a court of equity will remove it. (*Riley v. Pehl*, 23 Cal. 71.)

§ 440. **When sale may be enjoined.** A sale by a sheriff of real estate upon an execution against the grantor will, even if not effectual to pass the title to the purchaser, create a doubt as to the validity of the grantee's title and cast a cloud upon it and the grantee can maintain an action to enjoin the sale. (*England v. Lewis*, 25 Cal. 338.)

§ 441. **Purchase money lien—Right of assignee.** Under a statute providing that property mentioned is not exempt from attachment issued in an action for the purchase price thereof, or from execution issued upon any judgment rendered therein, an assignment of a note given for the purchase price of such property operates as an assignment of the right to collect it, and the assignee has the same right to sue and levy

on the property that the vendor had. (*Langevin v. Bloom*, 69 Minn. 22, 65 Am. St. Rep. 546, 71 N. W. 697.) The argument in favor of this decision is that unless the vendor can sell the debt accompanied by the privilege or right to levy on the property sold in the hands of the vendee, he does not get the full benefit of the right which the statute gives him. This right is one of the things which gives value to the debt. There is no reason in equity why the vendee should hold the property as exempt against process to collect the purchase money in favor of the assignee of the vendor, any more than if the process was in favor of the vendor himself. The theory upon which the statute cited was enacted, and upon which it is held constitutional, is that the buyer ought not as against the seller to hold the property as exempt until he has paid for it, and that the property passes to the buyer subject to this quasi vendor's lien; that is, subject to the paramount right of the seller to make the purchase money out of it.

§ 442. **Exemption claims in partnership.** In proceedings in insolvency instituted by a partnership neither of the partners can claim to have any part of the partnership assets set apart to him as exempt from execution. Partnership property is not exempt by law from forced sale, though it is such property as would be exempt if one partner were the sole owner. (*Cowan v. His Creditors*, 77 Cal. 403, 11 Am. St. Rep. 294, 19 Pac. 755.)

§ 443. **Horse, saddle, and bridle.** In Texas the exemption of a horse has been held to include his saddle and bridle, and also the rope with which he

was led or fastened. In these cases the court said: "A horse was not reserved because he was a horse, but because of his useful qualities, and his almost indispensable services; but what would be the benefit of a horse without shoes, or without saddle and bridle, or without gears, if employed for purposes of agriculture? It cannot be presumed that the legislature intended that a debtor should be reduced to the most primitive usage of riding without saddle or bridle; yet this may often be the only alternative if such appendages be held not exempt from execution. It would seem that by fair construction the grants in the statute must include, not only the subject itself, but everything absolutely essential to its beneficial enjoyment."

§ 444. **Lumber and shingle machines.** A steam engine, shingle machine, and saw gummer owned by a manufacturer of lumber and shingles are within Howard's Annotated Statutes, section 7686, subdivision 8, exempting from levy and sale under execution, etc., "the tools, implements . . . or other things to enable a person to carry on the profession, trade, occupation, or business" in which he is engaged. (*Wood v. Bresnahan*, 63 Mich. 614, 30 N. W. 206.)

§ 445. **Exempt seed grain.** In an action against a sheriff in Minnesota it was held that a willful levy upon exempt seed grain with the knowledge that it was exempt justified exemplary damages; and that an owner of a farm may claim the exemption of seed grain when renting the farm on shares and furnishing the seed. That it was immaterial whether the debtor required the seed grain in conducting his own

farm personally or for the purpose of furnishing it to a tenant who conducted the farm on shares. In either case it was for the debtor's personal use. (*Matteson v. Munroe*, 80 Minn. 340, 83 N. W. 153.)

§ 446. **Watchmakers' tools.** Under a statute exempting from execution "tools and implements" of trade or business, a lamp and show-cases with their tables and frame, of a watchmaker and jeweler are exempt. (*Begiullard v. Bartlett*, 19 Kan. 382, 27 Am. Rep. 120.)

§ 447. **Lens of photographer.** A lens of a photographer may be exempt as an implement of trade (*Davidson v. Harmon*, 67 Conn. 312, 52 Am. St. Rep. 282, 34 Atl. 1050, 34 L. R. A. 718), upon the same principle that a safe used by a jeweler in his business is held exempt under a statute exempting the implements of a mechanic or artisan necessary to carry on his trade. (*In re McManus*, 87 Cal. 292, 22 Am. St. Rep. 250, 25 Pac. 413, 10 L. R. A. 567.)

§ 448. **Safes.** The safe of an insurance agent, used as a place of deposit for notes and policies of insurance and other papers pertaining to the business, is exempt. (*Betz v. Maier*, 12 Tex. Civ. App. 219, 33 S. W. 710.)

§ 449. **Peddlers.** One who is engaged in delivering bread to the customers of his wife, who owns the bread and business and collects and receives the proceeds of sale, is not a peddler within the meaning of section 690, subdivision 6, of the Code of Civil Procedure, exempting from sale on execution cer-

tain property of a peddler by means of which he earns his living. (*Stanton v. French*, 83 Cal. 194, 23 Pac. 355.)

§ 450. **Printers' tools.** An apparatus for printing, consisting of a printing-press, cases, types, etc., may be "tools" exempted from execution under the statute, if necessary for the upholding of life. (*Patten v. Smith*, 4 Conn. 450, 10 Am. Dec. 166.)

Under section 690, subdivision 4, of the Code of Civil Procedure a person engaged in printing cannot claim as exempt any number of presses and amount of type he may have, but only such as are "necessary to carry on his trade." (*In re Mitchell*, 102 Cal. 534, 36 Pac. 840.)

The paper and ink employed by a printer in his business are stock in trade, and not "tools or implements of trade" within the meaning of a statute exempting such tools, etc., from execution. (*Sallee v. Waters*, 17 Ala. 482.) The same decision contains the declaration that the press and type necessarily used by him and his journeymen in the publication of a weekly newspaper are tools or implements of trade within the meaning of the statute of exemptions.

§ 451. **Watch repairers.** On a question whether a safe used by a jeweler and watch-repairer should be set off to him in insolvency proceedings as exempt under section 690, subdivision 4, of the Code of Civil Procedure exempting from execution "the tools or implements of a mechanic or artisan necessary to carry on his trade," he and another practical watch-maker and jeweler testified that such a safe was necessary to the profitable conduct of his business, and

that customers would not leave their watches to be repaired unless one were used: *Held*, that the safe was properly set off to him. (*In re McManus*, 87 Cal. 292, 22 Am. St. Rep. 250, 25 Pac. 413, 10 L. R. A. 567.)

§ 452. **Turning lathe.** A turning lathe, which is easily turned by one man, and such as is ordinarily used by mechanics, is exempt from execution, to a mechanic under section 690, subdivision 4, of the Code of Civil Procedure exempting "the tools or implements of a mechanic necessary to carry on his trade." (*In re Robb*, 99 Cal. 202, 37 Am. St. Rep. 48, 33 Pac. 890.) Such a lathe run with a belt and gasoline engine was also held to be exempt in an action in a superior court in California. (*In re McManus*, 87 Cal. 292, 22 Am. St. Rep. 250, 25 Pac. 413, 10 L. R. A. 567.) The court said: "The term 'implements' has a broader signification than the term 'tools,' and includes any instrument needed and used for the purpose of carrying on his trade or business"; that the statute must be liberally construed as being intended to protect the debtor.

§ 453. **Cheese presses.** In Kansas instruments used by a woman in making cheese, such as presses, vats, and knives, are exempt from seizure under judicial process as tools and instruments. (*Fish v. Street*, 27 Kan. 270.)

§ 454. **Insurance agents and searchers.** One carrying on business as an "insurance agent and abstractor of titles" is entitled to exemption from levy upon execution of one iron safe, one set of abstracts,

and one cabinet and table used in his business, such articles being "instruments" within the meaning of the law. (*Davidson v. Sechrist*, 28 Kan. 324.)

§ 455. **Milliners' exemptions.** Under General Statutes, chapter 133, section 32, exempting from execution the tools, implements, and fixtures necessary to carry on the business of a debtor, not exceeding one hundred dollars in value, a clock, stove, screen, pitcher, and table-cover used by a milliner should be exempted if the jury find them to have been necessary and in use in her business. (*Woods v. Keyer*, 96 Mass. (14 Allen) 236, 92 Am. Dec. 766.)

§ 456. **Tailors' exemptions.** A tailor may hold exempt from attachment or execution two sewing machines used for the purposes of his trade and reasonably necessary therefor, under General Statutes of 1878, chapter 66, section 310, exempting tools used in a trade, and that although subdivision 9 specifically enumerates only "one sewing machine." (*Cronfeldt v. Avrol*, 50 Minn. 327, 36 Am. St. Rep. 648, 52 N. W. 857.)

§ 457. **Double exemptions.** The act exempting specific property to the head of a family, and also the tools of a mechanic, is cumulative, so that, if a mechanic be the head of a family, he may have exempt in addition to his tools such property as the head of a family would be entitled to have who is not a mechanic. (*Harrison v. Martin*, 7 Mo. 286.)

§ 458. **Weavers' looms.** A weaver's loom is exempt as a necessary tool of a tradesman. (*McDowell v. Shotwell*, 2 Whart. 26.)

§ 459. **Barbers' chairs.** A barber's chair and foot-rest used by a barber in his business are exempt from attachment as "tools." (*Allen v. Thompson*, 45 Vt. 472.)

Two barber chairs, a mirror in front of and a table accompanying each, used constantly for five years in carrying on his trade by a barber, a citizen of the state and head of a family, are exempt from execution, where he is dependent on his trade for support, and has kept another barber employed to assist him. (*Fore v. Cooper*, (Texas) Civ. App., 34 S. W. 341.)

§ 460. **Commercial firms.** The implements by which the business of a commercial firm is carried on are not legally subject to seizure. (*Harrison v. Mitchell*, 13 La. Ann. 260.)

§ 461. **Shoemakers' machines.** Machines of simple construction, moved by hand or foot, and used in the manufacture of boots are exempt from seizure in the hands of a shoemaker carrying on a small business, though he has in his employ men working under him. (*Daniels v. Hayward*, 87 Mass. (5 Allen) 43, 81 Am. Dec. 731.)

§ 462. **When a stallion is not exempt.** In *Robert v. Adams*, 38 Cal. 383, 99 Am. Dec. 413, it is held that "a stallion is not exempt from levy when only kept for services of mares and not used as a work-horse. In exempting oxen, horses, and mules the intention was to enable the farmer to prosecute his business of farming in the ordinary sense of that term; and the oxen, horses, and mules which are

reserved to him must be such as are suitable and intended for that use. If a contrary construction of this provision were to prevail a farmer in failing circumstances might invest his whole estate in two valuable stallions or race-horses worth ten thousand or twenty thousand dollars each, with no intention whatever to use them for farming purposes, and by claiming them as exempt from execution might defraud his creditors under color of law to a large amount. The benevolent design of the statute might thus be perverted to purposes of the grossest fraud."

§ 463. **Multiplying employments.** One cannot by multiplying his employments claim cumulatively several exemptions given by statute to the different employments. The exemption is held to refer to that occupation which engrosses the most of his time and attention.

§ 464. **Exemption of officers' salary after expiration of his term.** Creditors of a public officer cannot intercept his salary by legal process. Hence the salary of a building inspector cannot be reached by proceedings supplementary to execution for the satisfaction of a judgment, though such proceedings are not commenced until after his term has expired and he has ceased to be an officer. (*Orme v. Kingsley*, 73 Minn. 143, 72 Am. St. Rep. 614, 75 N. W. 1123.) "We have repeatedly held," said the court, "that the salary of a public officer cannot be reached by his creditors by legal process. (*Roeller v. Ames*, 33 Minn. 132, 22 N. W. 177; *Sandwich Mfg. Co. v. Krake*, 66 Minn. 110, 61 Am. St. Rep. 395, 68 N. W. 606; *Sexton v. Brown*, 72 Minn. 377, 75 N. W. 600.)

This doctrine is founded on reasons of public policy, which may be all summed up in the general proposition that any other rule would interfere with the efficiency of the public service.

“It is sought, however, to distinguish this from former cases by the fact that these proceedings were not commenced until after the defendant’s term of office had expired, and he had ceased to be an officer. It is argued that under such circumstances it could not possibly affect the efficiency of the public service to permit the salary remaining due the defendant to be intercepted by legal process, and, as the reason for the rule has ceased to exist, the rule itself no longer obtains.

“It seems to us that the attempted distinction is merely one of degree, and not of principle. To permit money due as salary to a public officer to be intercepted by legal process after the party had gone out of office could not, of course, affect or change the character of his past services, but such a rule might prejudicially affect the public service generally. The services of public officers are usually not paid for until after they have been performed. They are, as a rule, paid for at stated periods—as, for example, monthly. There must be almost necessarily the lapse of some time between the expiration of a term of office and the payment of the last installment of salary, during which, according to the plaintiff’s contention, it would be subject to be intercepted by legal process. The fact that this could be done might interfere with the right of the public to fill offices with the most suitable men, regardless of their financial condition, and might also affect unfavorably the character of the services of the incumbent of public

offices—at least toward the close of their term of office. We can also conceive of abuses to which it might lead, where the power of removal from office at discretion is vested in some superior officer or body.

“It may be, and probably is, an open question whether, under existing conditions, the immunity of the salaries of public officers from legal process benefits or injures the public service; but the doctrine is too firmly established to be overturned by the courts, and, as long as it obtains, we can see no reason founded on principle for the distinction for which the plaintiff contends.”

§ 465. **Cloth for clothing exempt.** “In giving a construction to a remedial statute,” says the Massachusetts supreme court in the case of *Richardson v. Buswell*, 10 Met. 506, 43 Am. Dec. 450, “we are to bear in mind the great object and purposes which apparently led to its enactment, the mischief intended to be avoided, and which called for a remedy. By the general law of attachment, independent of the exemption which the statutes have made from time to time, everything belonging to the debtor, in the nature of property, might be taken on execution and sold. The law interposed, and, to secure to the debtor the absolute necessities of life, exempted from attachment and execution his ‘necessary wearing apparel.’ It is admitted that the wearing apparel, which was about to be made from the articles seized on execution, was necessary to the plaintiff. But it is said that it is not exempted from execution, because the cloth and trimmings thus seized were not yet fashioned and formed into a coat; and it is contended that, until that takes place, the exemption does

not apply. The counsel for the defendant asks, What is the limit to the exemption of articles adapted to clothing, if not that by him now insisted upon? Is the execution to be applied to the earlier stages of the wool manufactured, or the flannel before it is fulled and dyed? Now it seems to us, that whatever difficulties might exist as to the articles in these earlier stages above supposed, they do not arise here. This cloth was not merely made, or purchased for clothing, but was actually appropriated to that purpose. The case does not, therefore, depend upon the mere purpose of mind of the debtor to make such use of it at a future day, but on actual appropriation of it to the purpose of wearing apparel. To be useful and convenient for clothing, the articles needed the operation of the tailor, and they were placed in his hands, to be made into a coat. Having been thus appropriated and used, it assumes the character of clothing for the party, and is within the exemption given by the statute."

§ 466. **A watch is wearing apparel.** The supreme courts of Oregon and South Dakota have declared that a watch and chain are wearing apparel and exempt from execution. It is not so held in some of the other states. The California exemption law includes "wearing apparel" as articles that cannot be levied upon and sold under execution. The court in the South Dakota case referred to—*Grover v. Edmonds*, 8 S. D. 271, 59 Am. St. Rep. 762, 66 N. W. 310—said: "Appellant now contends that they [a gold watch and chain] are exempt under section 5127 of the Compiled Laws, which makes absolutely exempt all wearing apparel and clothing of the debtor and

his family." Whether a watch carried constantly by the debtor should be regarded as wearing apparel within the intent of the statute is the only question to be determined. Under a law providing that the "necessary wearing apparel owned by any person, to the value of one hundred dollars," shall be exempt, if selected, the supreme court of Oregon held that a watch not exceeding seventy dollars in value should be considered as an article of "wearing apparel," and quoted with approval from the language of Hammond, J., in *In re Steele*, 2 Flip. 324, Fed. Cas. No. 13346, as follows: "It would not be doing any great violence to the meaning of the term 'wearing apparel,' as used in the Bankrupt Act, to include in it a gold watch of moderate value. The definition of the word 'apparel,' as given by lexicographers, is not confined to clothing. The idea of ornamentation seems to be rather a prominent element in the word, and it is not improper to say that a man 'wears' a watch or 'wears' a cane." (*Stewart v. McClung*, 12 Or. 431, 53 Am. Rep. 374, 8 Pac. 447.) In *Rothschild v. Boelter*, 18 Minn. 362, it was held that a silver watch and chain worth forty dollars or fifty dollars, worn by the debtor, is not exempt under the statute as "wearing apparel of the debtor and his family." The court say: "That an article may be worn does not make it wearing apparel within this statute. The words are to be construed in this case according to the common and approved usage of the language, namely, as referring to garments or clothing generally designed for wear of the debtor and his family." It will be observed, however, that the Minnesota statute exempts "all wearing apparel and clothing of the debtor and his family." If the

exemption was to be limited to "garments or clothing generally designated for wear of the debtor and his family," it was unnecessary to use both terms, "wearing apparel" and "clothing." All authorities define "apparel" as including more than "clothing." Presumably the legislature employed both terms advisedly, and for the purpose of including in the exemption more than would be understood by the term "clothing." The exemption is not limited in value, nor by the word "necessary," found in most statutes. Watches are as essential to the comfort and convenience of men in nearly all vocations as are hats or coats; in many they are absolute necessities. The same condition, in perhaps a less marked degree, prevailed when the statute under discussion was enacted. While the question is not free from difficulty, and one upon which courts may easily differ, we are inclined to hold that defendant's watch and chain were absolutely exempt as wearing apparel."

§ 467. **Goods not exempt for money loaned for purchase price.** It has been held that a claim for purchase money need not have arisen in favor of the seller of property, and that one who lent money to be used, and which was used, in the purchase of a chattel has a claim for purchase money against which the exemption of the chattel from execution cannot be successfully urged. A judgment for the conversion of goods is not, it is said, within the benefit of this rule. It has been held that the judgment must be in favor of the vendor, and therefore that the transferee of a note given for purchase money has no immunity from the claim for exemption. Upon this

subject the authorities are very evenly divided, and we think those extending to an assignee of a vendor the same immunity from the exemption laws to which he was entitled are supported by the better reasoning. (*Freeman on Executions*, sec. 217.)

“The main question in this case,” say the court in *In re Houlehan v. Rassler*, 73 Wis. 557, 41 N. W. 720, “was whether the property levied upon by the defendant as constable was exempt. We are compelled to differ from the learned circuit court on that question, and to hold that the property was not exempt. The statute is very plain and explicit, and is susceptible of but one meaning, and the facts found bring this property clearly within its very terms. The plaintiff in the case in which the execution was issued ‘loaned to the plaintiff, at his special instance and request, eighty dollars, to be used by said plaintiff in purchasing, and to enable him to purchase, a team of horses and their harness of one J. Murray; and that said eighty dollars were used by said plaintiff in making said purchase, and were by him paid to said J. Murray as a part of the consideration for said horses and harness.’ I repeat these facts here to show how clearly they come within the very terms of the statute. The statute is: ‘No property exempt by the provisions of this statute shall be exempt from execution issued upon a judgment in an action brought by any person for the recovery of the whole or any part of the purchase money of the same property.’ (*Subd. 20, sec. 2982, Rev. Stats.*) Was this eighty dollars any part of the purchase money of the property? It was loaned to be used in purchasing the property, and to enable the plaintiff to purchase it, and was actually used in making the purchase, and

was paid to Murray as a part of the consideration of it. What other possible language could be used that is stronger or more explicit to make that money a part of the purchase money of the property? And yet the contention is that it was not, and the court gave that as a reason for the finding. The fact and the terms of the statute are too plain to admit of argument. It is contended that the one who loans the money should have actually paid it to the person who sold the property. The statute does not say so."

CHAPTER XVII.

REDEMPTION FROM EXECUTION SALE.

- § 468. The powers and duties of the sheriff.
- § 469. In what cases allowed.
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§ 468. **The powers and duties of the sheriff** in relation to redemption are purely statutory, and his acts are nugatory unless the provisions of the statute are strictly pursued. Who may redeem, and how redemption may be effected, if allowed at all, are matters as to which we must look to the statute in each particular state.

§ 469. **In what cases allowed.** When real estate or any interest therein is sold at execution sale redemption by the judgment debtor or by any of the interested persons known as "redemptioners" is allowed within a year, unless the estate sold be less than a leasehold interest of less than two years' unexpired term, in which case the sale is absolute. (*California. Code Civ. Proc., secs. 700, 702.*)

§ 470. **Who may redeem.** Property sold subject to redemption, or any part sold separately, may be redeemed by the following persons, or their successors in interest:—

"1. The judgment debtor, or his successor in interest, in the whole or any part of the property.

"2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are termed redemptioners." (*California. Code Civ. Proc., sec. 701.*)

§ 471. **Though defendant has conveyed, he may redeem.** A defendant in execution can redeem from an execution sale, notwithstanding he has conveyed

to another the property sold under execution. Section 701 of the (*California*) Code of Civil Procedure provides in terms that property sold subject to redemption may be redeemed by the judgment debtor or his successor in interest in the whole or any part of the property. The successor in interest may redeem, but the judgment debtor may also do so. The statute provides that the judgment debtor as such may redeem—not that he may redeem only in the event that he has no successor in interest in the property sold under execution. The court holds that there is no good reason why the statute, which is remedial in its character, should receive a narrow construction in order to defeat the right of redemption which it intended to give. It might be that the judgment debtor has covenanted with his successor in interest to effect a redemption from the sale, and a variety of other cases might readily be imagined in which the judgment debtor, even though he had sold the property, would still have an interest in effecting a redemption from the execution sale. (*Yoakum v. Bower*, 51 Cal. 539.)

§ 472. **Who cannot redeem.** Where a mortgagor filed a homestead subsequent to a second mortgage, and both mortgages were foreclosed, the first mortgage and part of the second being paid, and judgment for the deficiency due the second mortgagee being docketed, it was held in *Hershey v. Dennis*, 53 Cal. 77, that the lien of the docketed deficiency was superseded by the homestead, and that the second mortgagee could not redeem from the purchaser at the mortgage sale.

§ 473. **Redemption where tenants in common.** Where land sold under judgment is embraced in one sale, a redemptioner having a lien upon a share or part of the land sold can only redeem by paying the whole of the purchase money and redeeming the whole of the land; and in such case he succeeds to the whole interest of the purchaser. Accordingly, where land was sold under a judgment of foreclosure against tenants in common, and redeemed by a judgment creditor of one of the tenants, who in due course received his deed, as in the case of *Eldridge v. Wright*, 55 Cal. 531, it was held that the redemptioner took the interests of both tenants. Mr. Justice Thornton delivered the opinion of the court in this case. Mr. Justice Sharpstein, concurring in the judgment, doubted whether the redemptioner had a right to redeem a greater interest in the property sold than that of his judgment debtor; but was of the opinion, as the purchaser did not object to his redeeming the whole property, that the effect of the transaction was to vest in him the whole interest of the purchaser. Mr. Justice Myrick, dissenting, was of opinion that the redemptioner was subrogated to the rights of his judgment debtor, and thus became the owner of the legal title formerly held by him; and, as to the other tenant, that he acquired an equitable lien upon his interest as security for one half of the redemption money.

A owes B a debt; to secure it, A and C jointly mortgage to B a piece of land owned by them in common. Subsequently, A mortgages his undivided interest in the land to secure a debt to D. B forecloses against A and C, and buys in the whole land, not making D a party. The time of statutory redemp-

tion having expired, B gets a sheriff's deed: *Held*, that D, as subsequent mortgagee, may redeem A's, but not C's, interest in the land, and that the sale is final as to C's interest, D not being a necessary party to the foreclosure. (*Kirkham v. Dupont*, 14 Cal. 563.)

Redemption from execution sale by one tenant in common, after foreclosure of mortgage executed by both, restores the parties to their original title. (*Calkins v. Steinbach*, 66 Cal. 117, 4 Pac. 1103.)

§ 474. **Time of and payment in redemption.** Section 702 of the California Code of Civil Procedure provides that "The judgment debtor, or redemptioner, may redeem the property from the purchaser any time within twelve months after the sale on paying the purchaser the amount of his purchase, with one per cent per month thereon in addition, up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase, and interest on such amount. And if the purchaser be also a creditor, having a prior lien to that of the redemptioner, other than the judgment under which said purchase was made, the amount of such lien with interest."

§ 475. **Judgment debtor need produce no certificate.** It is not necessary for the judgment debtor, in effecting a redemption, to produce a certificate or other credential required by statute to be produced in case of redemption by a judgment or mortgage creditor. Those provisions do not apply to the judgment debtor. (*Yoakum v. Bower*, 51 Cal. 539.)

§ 476. **What redemptioner must produce.** Besides giving the statutory notice and making the payments required, the redemptioner must establish his right to redeem, and for this purpose must, under the California practice, "produce to the officer or person from whom he seeks to redeem, and serve with his notice to the sheriff:—

"1. A copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the court, or of the county where the judgment is docketed, or if he redeem upon a mortgage or other lien, a note of the record thereof, certified by the recorder;

"2. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself, or of a subscribing witness thereto;

"3. An affidavit by himself or his agent, showing the amount then actually due on the lien." (*California. Code Civ. Proc., sec. 705.*)

When the redemption is attempted to be effected through the sheriff, he has no authority, either to receive the redemption money from one claiming the right to redeem under a judgment, or to execute a deed to him, unless the redemptioner complies strictly with the provisions of the statute and produces a copy of the docket of the judgment under which he claims the right to redeem, or such other paper as the statute expressly requires to be produced. He should bear in mind that a transcript of a judgment is not equivalent to a copy of the docket of the judgment.

§ 477. **Successive redemptions—Notice and payments.** Section 703 of the California Code of Civil

Procedure provides that "if property be so redeemed by a redemptioner, another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner on paying the sum paid on such last redemption, with two per cent thereon in addition, and the amount of any assessment or taxes which the last redemptioner may have paid thereon after the redemption by him, with interest on such amount, and, in addition, the amount of any liens held by said last redemptioner prior to his own, with interest; but the judgment under which the property was sold need not be so paid as a lien. The property may be again, and as often as a redemptioner is so disposed, redeemed from any previous redemptioner within sixty days after the last redemption, on paying the sum paid on the last previous redemption, with two per cent thereon in addition, and the amounts of any assessments or taxes which the last previous redemptioner paid after the redemption by him, with interest thereon, and the amount of any liens, other than the judgment under which the property was sold, held by the last redemptioner previous to his own, with interest. Written notice of redemption must be given to the sheriff and a duplicate filed with the recorder of the county, and if any taxes or assessments are paid by the redemptioner, or if he has or acquires any lien other than that upon which the redemption was made, notice thereof must in like manner be given to the sheriff and filed with the recorder; and if such notice be not filed, the property may be redeemed without paying such tax, assessment, or lien. If no redemption be made within twelve months after the sale, the purchaser, or his assignee, is entitled to a conveyance; or if so redeemed, whenever sixty days have

elapsed, and no other redemption has been made, and notice thereof given, and the time for redemption has expired, the last redemptioner, or his assignee, is entitled to a sheriff's deed; but, in all cases, the judgment debtor shall have the entire period of twelve months from the date of the sale to redeem the property. If the judgment debtor redeem, he must make the same payments as are required to effect a redemption by a redemptioner. If the debtor redeem, the effect of the sale is terminated, and he is restored to his estate. Upon a redemption by the debtor, the person to whom the payment is made must execute and deliver to him a certificate of redemption, acknowledged or proved before an officer authorized to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the recorder of the county in which the property is situated, and the recorder must note the record thereof in the margin of the record of the certificate of sale."

§ 478. **Transfer of certificate of sale.** The simplest manner in which redemption may be effected is through the purchaser at sheriff's sale, by paying to such purchaser the redemption money and receiving from him the requisite transfer, if he will recognize the right of the applicant to redeem and waive the usual formalities. But if the redemption is sought to be made through the officer who made the sale, all the requirements of the statute must be complied with to secure the redemption.

A quit-claim deed from the holder of the sheriff's certificate after the time for redemption has expired is equivalent to an assignment of the same, and if the

sheriff afterward execute a deed to the purchaser, the same is void as between the parties. (*Ward v. Dougherty*, 75 Cal. 240, 7 Am. St. Rep. 151, 17 Pac. 193.)

§ 479. **When deficiency on judgment need not be paid in redemption.** During the time for redemption the legal title is in the mortgagor, and may be conveyed by him, and the grantee becomes entitled to redeem without paying to the mortgagee the unsatisfied portion of the judgment under which the property was sold to him, and the judgment for the deficiency is not a lien on the land.

Where, upon a foreclosure of a mortgage, the mortgagee purchases the land for a sum less than the amount of the judgment, and docketts a judgment for the deficiency, the purchaser from the mortgagor of the land, pending the time for redemption, is entitled as successor in interest to redeem from the mortgagee, without paying the amount of the deficiency. The former rule, that when real estate which is subject to a judgment lien is sold on an execution on the judgment to the judgment creditor, for a sum less than the whole amount of the judgment, the judgment creditor continues to be "a creditor having a lien" for the unsatisfied portion of the judgment upon the property sold under the execution, and that neither the judgment debtor nor a redemptioner with a subsequent lien could redeem without paying said judgment has been changed by the Code of Civil Procedure. (*Simpson v. Castle*, 52 Cal. 645.)

A judgment docketed for a deficiency after the sale of the mortgaged premises under a judgment of foreclosure is not a lien upon the premises sold if they

are purchased by any person other than the mortgage debtor. (*Black v. Gerichten*, 58 Cal. 56.)

§ 480. **Judgment debtor not compelled to pay prior liens.** In the case of *Sharp v. Miller*, 47 Cal. 82, the court held that the judgment debtor is not obliged to pay other liens which the purchaser may have on the property. The code makes a distinction between a redemption by the judgment debtor and by a creditor holding a lien on the property. Under section 702 of the Code of Civil Procedure of California, "the judgment debtor, or redemptioner, may redeem the property from the purchaser any time within twelve months after the sale on paying the purchaser the amount of his purchase," etc. The same section further provides that "if the purchaser be also a creditor, having a prior lien to that of the redemptioner, other than the judgment under which said purchase was made," he must also pay the amount of such lien. Section 701 defines a redemptioner to be "A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold." The judgment debtor is not a "redemptioner" in the sense in which the term is employed in section 702 of the Code of Civil Procedure.

But if a "redemptioner," or, in other words, a creditor, holding a subsequent lien on the property, redeems, he must also pay to the purchaser any liens he may have prior to that of the redemptioner other than that for which the property was sold. The reason for the distinction made between the judgment debtor and a redemptioner is that, if the latter were permitted to redeem without paying the prior

lien held by the purchaser, the title would pass to the redemptioner and the lien of the purchaser would be defeated. But if the judgment debtor redeem, he is restored to his estate, and the lien held by the purchaser will be available.

§ 481. **Partnership judgment.** Under section 702 of the Code of Civil Procedure of California (*sec. 474, ante*), a judgment debtor whose lands have been sold under execution may redeem the same from the purchaser without paying a prior judgment against him held by a partnership of which the purchaser is a member. (*Campbell v. Oaks*, 68 Cal. 222, 9 Pac. 77.)

§ 482. **Redemption of real estate of a decedent.** Section 1505 of the Code of Civil Procedure of California provides that "A judgment creditor having a judgment which was rendered against the testator or intestate in his lifetime, may redeem any real estate of the decedent from any sale under foreclosure or execution, in like manner and with like effect as if the judgment debtor were still living."

§ 483. **Redemption of franchise.** A corporation may at any time within one year after execution sale redeem its franchise by paying or tendering to the purchaser thereof the sum paid therefor with ten per cent interest thereon but without any allowance for the toll which he may in the mean time have received; and upon such payment or tender, the franchise and all the rights and privileges thereof revert and belong to the corporation as if no such sale had been made. (*California. Civ. Code, sec. 392.*)

§ 484. **Payments in redemption — To whom made.** The payments for redemption of the property sold may be made to the purchaser or prior redemptioner, or for him to the officer who made the sale. When the judgment under which the sale has been made is payable in a specified kind of money or currency, payments must be made in the same kind of money or currency.

§ 485. **Tender equivalent to payment.** A proper tender of the full amount due on redemption of real property extinguishes the purchaser's lien, and is equivalent to payment. (*Hershey v. Dennis*, 53 Cal. 77.)

§ 486. **What money sheriff may receive in redemption.** The sheriff is the special agent of the purchaser of land, authorized to receive the redemption money for him, and as such may receive in redemption any lawful money, unless the judgment under which the sale was made was rendered payable in a particular kind of money. A payment to the sheriff for the redemption of land sold under execution cannot be made in certified checks. (*People ex rel. Mulford v. Mayhew*, 26 Cal. 655.)

§ 487. **Redemption in treasury notes.** It is held in the case of *People ex rel. Mulford v. Mayhew*, 26 Cal. 656, that the obligation of a judgment creditor or redemptioner to pay a certain amount of money in order to exercise the statutory right of redemption from a sale of land made by a sheriff is a debt within the meaning of the act of Congress making treasury notes lawful money and a legal

tender in payment of debts. Land sold at sheriff's sale under a judgment payable generally in money without specifying a particular kind of money may be redeemed with treasury notes.

§ 488. **Withdrawing redemption money defeats redemption.** If the judgment debtor whose land has been sold on the judgment deposits with the sheriff before the time for redemption expires money sufficient to redeem it from the sale, and the sheriff, after the time for redemption expires, executes and delivers to the purchaser a deed, the judgment debtor, if he would claim the benefit of the redemption, must not withdraw the money from the sheriff, for by withdrawing the money he ratifies the act of the sheriff in delivering the deed. (*Wilkins v. Wilson*, 51 Cal. 212.)

§ 489. **Payment under protest.** When a redemptioner, under the statute, pays to the sheriff an excess of money, under protest as to the excess, the payment is not compulsory. (*McMillan v. Vischer*, 14 Cal. 232.)

§ 490. **Possession pending time for redemption.** A purchaser at sheriff's sale does not acquire title, but only a lien until after the period limited for redemption. The California statute allowing a redemption of real property sold at judicial sales and allowing the purchaser to collect the rents of the property plainly contemplates that the possession shall not change to the purchaser until the expiration of the time prescribed as a limit to the redemption. Section 564 of the Code of Civil Procedure

provides that a receiver may be appointed in certain contingencies. Section 706 of the Code of Civil Procedure gives the court power to restrain the commission of waste on the property and provides that "it is not waste for the person in possession of the property at the time of the sale, or entitled to possession afterward, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used." These provisions most clearly contemplate an adverse possession to the purchaser until the time has expired for redemption.

§ 491. **Rents and profits before redemption.** Under the practice in California and Nevada "The purchaser, from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, is entitled to receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser, or his or their assigns, from the property thus sold preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption money to be paid; and if the redemptioner or judgment debtor, before the expiration of the time allowed for such redemption, demands in writing of such purchaser or creditor, or his assigns a written and verified statement of the amounts of such rents and profits thus received, the period for redemption is extended five days after such sworn statement is given by such purchaser or his assigns to such redemptioner or debtor. If such purchaser or his assigns shall, for a period

of one month from and after such demand, fail or refuse to give such statement, such redemptioner or debtor may bring an action in any court of competent jurisdiction to compel an accounting and disclosure of such rents and profits, and until fifteen days from and after the final determination of such action, the right of redemption is extended to such redemptioner or debtor." (*California. Code Civ. Proc., sec. 707.*)

§ 492. **Rents pending redemption — Decisions.** Where the owner of mortgaged premises leases the same for a term of years, and the rent is paid in advance by the tenant: *Held*, that the purchaser under the mortgage sale can require the tenant to pay the rent over again to him. After sale and before the term of redemption has expired the purchaser is entitled to collect the rents. (*McDevitt v. Sullivan*, 8 Cal. 593.)

A purchaser of land at sheriff's sale can maintain an action for rent against the tenant in possession under the judgment debtor before the expiration of the six months allowed for redemption, and as often as the rent becomes due under the terms of the lease when he purchased. (*Reynolds v. Lathrop*, 7 Cal. 43.) The sale operates as an assignment of the lease for the time.

The purchaser at sheriff's sale of a "water ditch" is entitled to the rents and profits thereof from the date of the sale until the expiration of the time for redemption as well from the judgment debtor in possession as from his tenant, and where a judgment debtor remains in possession of a "water ditch" after sheriff's sale, and collects the rents and profits

during the six months following, he is a trustee of the fund for the purchaser at the sale, and if the fund be in danger of loss a bill in equity to account will lie. (*Harris v. Reynolds*, 13 Cal. 515, 73 Am. Dec. 600.)

A judgment debtor who redeemed his property within twenty-one days after the sheriff's sale, but who had received from his tenants in possession four hundred and forty-five dollars rent between the day of sale and the redemption, held liable to the purchaser at the sale for the amount so received. (*Kline v. Chase*, 17 Cal. 596. Also cited as authority in *Walls v. Walker*, 37 Cal. 432, 99 Am. Dec. 290; and see *Knight v. Truett*, 18 Cal. 113; *Raun v. Reynolds*, 18 Cal. 289; *Hill v. Taylor*, 22 Cal. 191; *Henry v. Evarts*, 30 Cal. 425; *Webster v. Cook*, 38 Cal. 425; *Page v. Rogers*, 31 Cal. 294.)

§ 493. **Rents—Attachment will not lie.** While the statute gives to the purchaser the right to receive the rents of the property sold pending the time for redemption, he cannot enforce such right by writ of attachment against the tenant's property. In the case of *Walker v. McCusker*, 65 Cal. 360, 4 Pac. 206, the court say:—

“This action was brought to recover of the defendant, as tenant in possession of real estate purchased by plaintiff on decree of foreclosure and sale, the sum of \$1,200, value of the use and occupation from the day of sale to the making of the deed. The plaintiff sued out a writ of attachment by which property was attached; the defendant moved that the attachment be dissolved; the court below denied the motion, and the appeal from the order of denial is before us.

"Section 707 of the Code of Civil Procedure declares that the purchaser, from the time of sale, is entitled to receive from the tenant in possession the rents of the property sold or the value of the use and occupation.

"The liability of the tenant in possession to the purchaser, for rents or use and occupation from the day of sale to the expiration of the time for redemption, is a statutory liability merely, and exists without the assent of the person in possession. It is not a liability founded on a contract expressed or implied within the meaning of section 537 of the Code of Civil Procedure, authorizing the issuance of an attachment."

§ 494. **Rights of creditors.** After the execution of a mortgage upon real estate, a judgment was rendered against the mortgagor which became a lien upon the mortgaged property; the mortgagee then foreclosed the mortgage, making the mortgagor alone a party defendant, had the property sold under the decree, became the purchaser and obtained a sheriff's deed; afterwards the judgment creditor procured an execution upon his judgment and had the property advertised for sale; the holder of the title under the sheriff's deed filed a bill in equity to enjoin the sale: *Held*, that he was not entitled to an injunction, and that the judgment creditor had a right to sell any interest in the land held by the judgment debtor at the rendition of the judgment or levy of the execution. *Held*, further, that the judgment creditor's equitable right of redemption not having been cut off by the foreclosure, he might during the two years that his judgment was a lien upon the premises sell

under an execution and purchase the legal title of the mortgagor, not only that he might assert his right of redemption at any time within the period allowed by the statute of limitations, but also, that he might realize any other benefit or advantage that might accrue to him from the sale. (*Alexander v. Greenwood*, 24 Cal. 506.)

§ 495. **Various decisions in redemption cases.**

A creditor of the mortgagor obtaining a judgment after sale under the decree of foreclosure, but before the execution of the conveyance thereunder, acquires a lien on the estate entitling him to redeem. (*McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655.)

A subsequent mortgagee would have a right to redeem premises from a sale under a judgment upon mechanics' lien by paying the money justly due, interest, costs, etc., he not having been a party to the suit by the lienholder. (*Gamble v. Woll*, 15 Cal. 510.)

A mortgagee of the defendant in execution, who has failed to record his mortgage until after the sale, has no lien or intervening rights as against the purchaser; he can redeem under the statute; if he fails to do so a court of equity will not interpose. (*Smith v. Randall*, 6 Cal. 53, 65 Am. Dec. 475.)

The equitable right to redeem property sold under a decree of foreclosure held by subsequent encumbrancers is merged into a statutory right, not by any force given to the language of the decree, but by the fact that they have had their day in court and an opportunity of setting up any equities they possessed. After the decree they stand as to their right of redemption in the same position as ordinary judgment debtors. (*Montgomery v. Tutt*, 11 Cal. 307.)

The right of the mortgagor to redeem is not affected by the fact that he may have had no title to the mortgaged property, nor can the mortgagee refuse the redemption money, if tendered, because the mortgagor had no title to mortgage. (*Lorenzana v. Camarillo*, 45 Cal. 125.)

A deed conveying land and in express terms reserving to the grantor a lien to secure the payment of two promissory notes for a part of the price creates an equitable mortgage upon the land. Such lien is more than a vendor's lien and is not lost by the assignment of the promissory notes. (*Dingly v. Bank of Ventura*, 57 Cal. 467.) Such a lien may be foreclosed as a mortgage, and there is the same right of redemption for a limited period after a foreclosure sale.

In the case of *Rumpp v. Gerkins*, 59 Cal. 496, Leonis, a prior mortgagee, brought suit for foreclosure, obtained the usual decree, and the writ was placed in the sheriff's hands for execution. The mortgagees then executed a conveyance of the premises to Leonis, it not being intended by the latter that his security should merge in the conveyance or that his lien should be extinguished. Following, Leonis purchased the premises at the sheriff's sale. Plaintiff, claiming under a junior mortgage not affected by the prior suit, joined Leonis as defendant in an action of foreclosure, claiming the conveyance to Leonis operated a merger of his mortgage lien upon the premises. The court adjudged that the lien of Leonis was not merged, that plaintiff should redeem the property from Leonis by paying the latter the amount bid at the sheriff's sale.

§ 496. **Statutory and equitable right of redemption.** The right to redeem under the statute from a sale on execution exists in some instances where there is no equity, and in other instances in connection with the equitable right. Parties to the suit in which the judgment is rendered under which the sale is made are restricted to the twelve months given by statute. Parties acquiring interests pending suits to enforce previously existing liens or after judgment docketed or sale made have no equity and are confined to the rights given by the statute; but parties obtaining interests subsequent to the plaintiff and before suit brought, who are made parties in such suit, possess both the equitable and statutory right. They may redeem under the statute, or they may file their bill in equity. Where a mechanics' lien attached on certain premises January 18, 1856, and a mortgage was placed on the same premises January 21, 1856, and a suit was brought subsequent to the execution and record of the mortgage to enforce the mechanics' lien, in which suit the mortgagees were not made parties and under the decree rendered in such suit a sale was made and after the expiration of the time for redemption no redemption being had, a deed was executed to the assignees of the sheriff's certificate, it was held in *Whitney v. Higgins*, 10 Cal. 547, 70 Am. Dec. 748, that the right of the mortgagees to redeem the premises by paying off the encumbrance of the mechanics' lien was not affected by the decree and the proceedings thereunder and that the purchasers of the premises upon a decree of foreclosure of the mortgage, having received his (the sheriff's) deed upon such purchase, were entitled to the same right to redeem.

§ 497. **Subsequent judgment lien.** The payment by a judgment debtor of the judgment after a sheriff's sale extinguishes the lien; and the fact that he takes a transfer of the certificate and the sheriff's deed instead of a certificate of redemption cannot divest the lien of a subsequent judgment. (*McCarthy v. Christie*, 13 Cal. 79.)

The purchaser at an execution sale, before conveyance to him has a right to redeem the property sold on the enforcement of a prior lien; after conveyance to him he has the same right as successor in interest to the debtor or mortgagor. (*McMillan v. Richards*, 9 Cal. 413, 70 Am. Dec. 655.)

§ 498. **Costs of appeal in redemption.** Where a judgment is against two, one only of whom appeals, and the appeal is dismissed with twenty per cent damages, the damages with the costs do not become part of the original judgment, and the redemptioner is not bound to pay them when he redeems from a sale under the judgment. (*McMillan v. Vischer*, 14 Cal. 232.)

§ 499. **When possession and title pass.** The title to land sold at execution sale does not pass until the execution and delivery of the deed. The legal estate exists in the judgment debtor after expiration of the time to redeem until execution of the conveyance to the purchaser. In the absence of statutory provision to the contrary, the provisions allowing a redemption of property sold at judicial sale contemplate that the possession shall not change to the purchaser until the expiration of the time limited for redemption. (*Guy v. Middleton*, 5 Cal. 392.)

§ 500. **Sale of franchises—Redemption of.** Section 388 of the Civil Code provides that for the satisfaction of any judgment against any person, company, or corporation having any franchise other than the franchise of being a corporation, such franchise and all the rights and privileges thereof may be levied upon and sold under execution in the same manner and with the same effect as any other property.

Section 391 of the Civil Code provides that the person, company, or corporation whose franchise is sold as in this article provided in all other respects retains the same powers, is bound to the discharge of the same duties, and is liable to the same penalties and forfeitures as before such sale.

Section 392 of the Civil Code provides that redemption from any such sale may be had as provided in the Code of Civil Procedure in the case of redemptions from sales of real estate on execution.

Section 393 of the Civil Code provides that the sale of any franchise under execution must be made in the county in which the corporation has its principal place of business or in which the property or some portion thereof is situated.

CHAPTER XVIII.

SHERIFF'S DEEDS.

- § 501. When deed is due.
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- § 510. Premature sheriff's deed is void.
- § 511. When mandamus to sheriff will not lie.
- § 512. Deed by deputy.

§ 501. **When deed is due.** The purchaser, or his assignee, is entitled to a sheriff's deed after the expiration of the period fixed by the statute for redemption. This period varies under the statutes in different states, and in some there is no redemption, the sale being absolute in the first instance. (*See secs. 474, ante.*)

The term "months" used in the statute fixing the period of redemption from judicial sales means calendar and not lunar months, and a sheriff's deed executed before the expiration of the statutory period of redemption is absolutely void and not merely voidable. (*Gross v. Fowler*, 21 Cal. 393.)

§ 502. **When deed takes effect.** When a judgment is rendered in an attachment suit, and becomes a lien on real property the lien of the attachment is

merged in the judgment and the deed which follows takes effect from the date of the attachment. The judgment does not operate so as to release or obliterate the attachment lien. The property attached is still in contemplation of law in the hands of the officer, subject to the judgment. The property is sold under final process issued on the judgment, but the deed made to the purchaser at the sale as the last of the series of acts takes effect from the date of the levy of the attachment as the first of the series of acts and perfects the title of the property from the day when it was taken by the officer for the satisfaction of the judgment. In the case of *Porter v. Pico*, 55 Cal. 174, Mr. Justice McKee, who delivered the opinion of the court, said:—

“Perhaps it would be more in accordance with the fitness of things to deal with the fact of the levy of the attachment as of an incipient execution, by which the officer has taken into his possession the subject of the levy for the satisfaction of any judgment which might be recovered, and to order him after judgment, to sell the specific property for that purpose. Under the other practice the levy of the attachment upon the principal *transit in rem judicatam* becomes merged in the judgment, and the judgment perpetuates the lien of the levy, and the sheriff’s deed perfects the title which passes by the sale under the judgment and relates to the date of the levy. Upon these principles it is not necessary for the court, in order to enforce priority of lien, to make an order for the sale of the property attached, or to issue a *venditioni exponas*. The execution upon the judgment is a sufficient authority to the sheriff to sell the real property which he has in his possession, and the deed

which he makes relates back to the date of the lien perpetuated by the judgment." (*See, also, next section.*)

A sheriff's deed takes effect from the time of its actual delivery, and the execution of the deed by the sheriff and information given by him to the grantee that the deed is ready for him do not amount to a delivery. (*Jefferson v. Wendt*, 51 Cal. 573.) The statute of limitations does not commence running against a purchaser of land at a sheriff's sale until the sheriff's deed has been delivered to the purchaser or some one for him in such a way as to be beyond the legal control of the grantor.

§ 503. **What sheriff's deed conveys.** The sheriff's deed on execution sale passes such title and interest as the judgment debtor had in the land at the time of the levy and such as he acquired between the time of the levy and the sale. (*Kenyon v. Quinn*, 41 Cal. 325; *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820.) When an attachment has been levied in the suit under which the sale is made, however, the deed of the sheriff also relates back to the attachment and conveys such title as the judgment debtor had at that time. (*Porter v. Pico*, 55 Cal. 165.) And in case of any other statutory lien, for satisfaction of which the sale is made, the deed relates back to the vesting of such lien. (*Littlefield v. Nichols*, 42 Cal. 372.) When there are no judgment or attachment or other statutory liens the deed relates back only to the time of the levy of the execution. (*Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441.)

The sheriff's deed of an equitable title standing in the judgment debtor does not by operation of law

pass the legal title which may thereafter be acquired by him, but the debtor holds the legal title in trust for the purchaser under the sheriff's sale. (*Kenyon v. Quinn, ante. See, also, sec. 502, ante.*)

§ 504. **Recitals in sheriff's deed.** The officer who makes a sale of land by virtue of an execution and executes to the purchaser a deed therefor must in his deed make recitals of the recovery of the judgment, the names of the judgment creditor or creditors and of the judgment debtor or debtors and of the issuing of an execution on the judgment and of the levy and sale thereunder. The recital of such facts is essential to show the officer's authority and the transmission of the debtor's title in the property to the purchaser. (*Donahue v. McNulty, 24 Cal. 411, 85 Am. Dec. 78.*)

"It may be regarded as settled in California that the misrecital of the execution in an officer's deed will not affect the validity of the deed, if the officer had authority to sell." (*Wilson v. Madison, 55 Cal. 5.*)

§ 505. **Parol evidence not admissible.** Parol testimony of the officer who makes a sale of property under an execution and executes a deed to the purchaser therefor is not admissible for the purpose of adding to, contradicting or altering the terms of the deed.

Parol evidence is inadmissible to show that a constable's sale was made by virtue of any other judgment or execution than that recited in the deed; and it is also inadmissible to show that the constable sold the interest of a person in the land described in

the deed whose interest the deed itself does not recite upon its face to have been sold. (*Donahue v. McNulty*, 24 Cal. 412, 85 Am. Dec. 78.)

§ 506. **Who estopped by recitals in sheriff's deed.** The officer executing a deed for property sold under execution, and those who claim under the deed, are estopped from denying the truth of the matters recited therein, but the same are not evidence as against strangers, or those claiming adversely to the deed. (*Donahue v. McNulty*, 24 Cal. 411, 85 Am. Dec. 78.)

§ 507. **Against whom officer's deed is evidence.** A deed of a constable, made of land sold under execution, is not evidence of the purchaser's title as against any person except those whom the deed shows upon its face to have been judgment debtors, and named as such in the execution issued on the judgment, and whose interest in the property was sold by the officer. (*Donahue v. McNulty*, 24 Cal. 411, 85 Am. Dec. 78.)

§ 508. **How meaning of deed is ascertained.** Where the language of a deed executed by an officer for property sold under execution is plain and unambiguous the court should limit its inquiry to what the words of the deed express without regard to any intention independent of the words. (*Donahue v. McNulty*, 24 Cal. 411, 85 Am. Dec. 78.)

§ 509. **Against whom officer's deed not evidence.** Where a judgment was rendered against several persons and the execution issued upon it against all the

judgment debtors and the constable levied upon and sold the land of one of the judgment debtors, but in making a deed to the purchaser did not insert the name of the one whose land had been sold as a judgment debtor or recite that his land had been sold: *Held*, that the deed was not evidence of title in the purchaser as against the owner of the land. (*Donahue v. McNulty*, 24 Cal. 411, 85 Am. Dec. 78. See, also, secs. 506, 507, ante.)

§ 510. **Premature sheriff's deed is void.** If a sheriff's deed be given before the time for redemption has expired it is void. (*Gross v. Fowler*, 21 Cal. 393. See, also, sec. 501, ante.)

§ 511. **When mandamus to sheriff will not lie.** A mandamus will not lie to compel a sheriff to make a deed of land to a purchaser at execution sale who refuses to pay the purchase money on the ground that he is entitled to it as the oldest judgment and execution creditor, especially when there is an unsettled contest as to the priority of his lien. (*Williams v. Smith*, 6 Cal. 98.)

§ 512. **Deed by deputy.** A sheriff's deputy may execute a deed for property sold under execution, but he must execute it in the name of the sheriff. (*Lewis v. Thompson*, 3 Cal. 267.)

CHAPTER XIX.

SHERIFF'S SALES.

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§ 513. **Sale of perishable property.** In the case of *Witherspoon v. Cross et al.*, 135 Cal. 96, 67 Pac. 18, the sheriff attached a lot of groceries, lumber, etc., and sold a few articles such as beef as perishable and held the remainder about eleven months. The defendant had judgment, the attachment was dismissed, and the sheriff was sued for depreciation of value of the property while in his custody. The court held the sheriff liable and the case was appealed. The following is from the decision:—

“It is contended by appellants, however, that the stock of groceries and provisions, consisting principally of canned goods, coffee, flour, and farinaceous goods, should have been sold by the sheriff as perishable goods. Section 547 of the Code of Civil Procedure provides: ‘If any of the property attached be perishable, the sheriff must sell the same in the manner in which such property is sold on execution.

. . .’ But the code does not define what is ‘perishable property.’ Black’s Law Dictionary defines ‘perishable goods’ as ‘goods which decay and lose their value if not speedily put to their intended use.’ The same author defines ‘perishable’ thus: ‘Perishable’ ordinarily means subject to speedy and natural decay. But where the time contemplated is necessarily long the term may embrace property liable merely to material depreciation in value from other causes than such decay.’ But here the time was not ‘necessarily long.’ The sheriff sold a few articles, such as fresh beef, as perishable, but he could not anticipate that the attached property would remain in his hands for nearly a year. Had he immediately sold the whole stock as perishable, and the next day or the next week the action had been dismissed, or the attachment otherwise discharged, could it be doubted that the sheriff would be liable for the full value of the goods, and not merely for the proceeds of the sale? In *Webster v. Peck*, 31 Conn. 498, the court adopted Webster’s definition, ‘subject to speedy decay,’ and added: ‘The great delay, however, between the attachment of property on mesne process and obtaining judgment which attended litigation previous to the reorganization of our judicial system, and the obvious equity of the law, led to a liberal construction of the statute to advance the remedy, and orders for the sale of property not in its nature perishable, but which would materially depreciate in value for other causes, have been quite common.’ In this state, however, we have more than ‘the equity of the law’ above spoken of. Section 548 of the Code of Civil Procedure expressly provides that when property has been taken under a writ of attachment

and it is made to appear to the court or a judge thereof that the interest of the parties will be subserved by a sale thereof, the court or judge may order it to be sold. The order cannot be made except upon notice to the adverse party. It is clear, therefore, that the sheriff has no authority to sell property that is not perishable within the meaning of section 547 of the Code of Civil Procedure without an order of the court or judge made after notice."

A sheriff has no authority to sell property that is not perishable within the meaning of section 547 of the Code of Civil Procedure, held under an attachment, without an order of court. (*Witherspoon v. Cross*, 22 Cal. 846.)

§ 514. **Clerical errors in notice of sale.** A sale will not be vacated merely because the notice of sale does not correctly state the date the decree was rendered, where the notice otherwise with sufficient accuracy described the decree under which the sale was made. (*Mead v. Hoover*, 63 Neb. 419, 88 N. W. 655.)

A judicial sale will not be set aside merely because the notice of sale does not state the amount due on the decree. (*Dederick v. Gillespie*, 63 Neb. 422, 88 N. W. 659.)

Nor will such sale be set aside merely because the officer did not return the order of sale within sixty days from the date thereof. (*Cross v. Leidich*, 63 Neb. 420, 88 N. W. 667.)

§ 515. **Defective notice of sale.** Where the statute does not require the sheriff to specify in the notice of sale the names of either the plaintiff or defendant

in judgment or the name of the judgment debtor whose property is being sold, a sale will not be vitiated by the failure of the notice to set out the names of the parties. (20 *Ency. Plead. & Prac.*, p. 197.) It is of no importance to the public whether the execution debtor is named or not. In *Harrison v. Cachelin*, 35 Mo. 79, the sheriff, having an execution against A, B, and C, in his advertisement stated that by virtue of an execution against A "and others" he had levied upon, etc., describing the time and place of sale and the property to be sold. It was held that the advertisement complied with the statute and the title passed by the sheriff's sale and deed. In *McLain Lumber and Improvement Co. v. Kelly*, 11 Okla. 26, 66 Pac. 282, the sheriff omitted a part of the defendant's name from his advertisement, and the court held that the omission did not vitiate the sale.

§ 516. **Official advertising.** The legislature of California (1903) settled the long-mooted question as to what constitutes legal publication, or official advertising, by adding the following sections to the Political Code:—

"4458. Whenever any publication, or notice by publication, or official advertising is required to be given or made by the provisions of this code, the Civil Code, the Code of Civil Procedure, the Penal Code, or by any law of the state, by any officer now existing, or any hereafter to be created, in this state, or any political subdivision thereof, or by any officer of a county, city, city and county, or town, such publication or notice by publication, or advertising, shall be given or made only in a newspaper of general circulation, where such a newspaper is published within the jurisdiction of said official.

“4460. A newspaper of general circulation is a newspaper published for the dissemination of local or telegraphic news and intelligence of a general character, having a bona fide subscription list of paying subscribers, and which shall have been established, printed, and published in the state, county, city, city and county, or town, where such publication, notice of publication, or official advertising, is given or made, for at least one year. A newspaper devoted to the interests, or published for the entertainment of a particular class, profession, trade, calling, race, or denomination, or any number thereof, is not a newspaper of general circulation.”

§ 517. **Power, under foreclosure, to sell land in another county.** The sheriff, in making sale on foreclosure, is the mere executive officer of the court. The manner of sale, as to its being public, and the notice thereof to be given, is fixed by statute; but what he shall sell, regardless of the *situs* thereof, is determined by the decree under which the sale is made. Unless otherwise provided in the decree, his power to sell real property situated outside of his county is coextensive with the jurisdiction of the court by decree to order such sale. The sale itself is a part of the proceeding of foreclosure, and the foreclosure is not complete until the sale is made and the equity of redemption is extinguished. (*Goldtree v. McAllister*, 86 Cal. 105, 24 Pac. 801.)

There can be but one action for the foreclosure of a mortgage. (*Code Civ. Proc.*, sec. 726.) And though the mortgage may cover several separate tracts or parcels of land it cannot be foreclosed piecemeal. (*Mascarel v. Raffans*, 51 Cal. 242.) The

mortgage being a lien upon real property, the action for its enforcement must be brought in the county in which the real property affected or some part thereof is situated. (*Const., art. 6, sec. 5.*) Where the real property is situated partly in one county and partly in another the plaintiff may select either of the counties in which to bring his action of foreclosure, and the county so selected is the proper county for the trial of such action. (*Code Civ. Proc., sec. 392.*) Every judicial, ministerial, and executive official act necessary to effect the foreclosure may be performed in any county in which any part of the mortgaged property is situated. (*Goldtree v. McAlister, supra, p. 106.*) Under this decision there can be no doubt that where the mortgaged property consists of one body, though situated in several counties, it may all be sold by the sheriff of that one of those counties in which the decree is entered. The language of the decision would imply that such a sale would be valid, though the land consisted of several distinct and separate parcels situated in different counties, unless the decree itself directed otherwise. But in practice, where the land in the different counties is composed of separate and distinct tracts, the courts frequently (but perhaps not universally), in and by the decree direct that the several separate parcels be sold by the sheriffs of the different counties in which they are respectively situate, and separate orders of sale are issued accordingly, as separate executions may issue to sheriffs of different counties upon the same judgment. It should be noted, however, that in all cases the sheriff making the sale should give the notice required by subdivision 3 of section 692 of the Code of Civil Procedure, viz., by posting

written notice of the time and place of sale, particularly describing the property, for twenty days, in three public places of the township or city where the property is situated, and also where the property is to be sold, and publishing a copy thereof once a week for the same period in some newspaper published in the county, if there be one.

The foreclosure of a mortgage embraces the sale of the property, and the execution of the sheriff's deed, as well as the decree of the court ordering the sale. A mortgage cannot be said to be foreclosed, even in the sense of our code, until the mortgagor's right of redemption is cut off. Anderson's Law Dictionary defines "foreclosure" as follows: "1. Specifically, the extinguishment of a mortgagor's equity of redemption beyond possibility of recall. A mortgage is foreclosed in the sense that no one has the right to redeem it or to call the mortgagee to account under it. In no sense can the term be applied to a mortgage until *sale* of the property has been effected." (*Referring to 3 Bla. Com. 118; Puffer v. Clark, 7 Allen, 85; and Duncan v. Cobb, 32 Minn. 464, 21 N. W. 714.*)

In *Goldtree v. McAlister*, above cited, it is said: "In providing that an action for the foreclosure of a mortgage may be commenced and tried in any county in which any part of the mortgaged property is situated, it must have been the intention of the legislature that the mortgage should be *foreclosed* in such county; that is to say, that every judicial, ministerial, and executive official act necessary to effect a foreclosure might be performed in any county in which any part of the property was situated. A piece of mortgaged land may be partly situated in

several different counties, as where three or four counties corner upon it, and also where it is traversed by a meandering stream which marks the boundary line between two counties. In such case it would be very inconvenient and unnecessarily expensive to require each part of the land to be separately sold and conveyed by the sheriff of the county in which it is situated. Beside, it would generally turn out that the sum of the value of all the parts thus sold would not equal the value of the undivided whole. These considerations strengthen the construction permitting the mortgage to be completely foreclosed in any one of the counties in which any part of the mortgaged property is situated."

§ 518. **Harmless irregularity in decree.** Where a decree of foreclosure of a mortgage directed the sale to be made by a commissioner who was named therein, and the decree was copied in the body of the order of sale and formed part of it, the fact that the order of sale was directed to the sheriff, while the commissioner executed it, is a harmless irregularity and does not avoid the sale. (*Taylor v. Ellenberger*, 128 Cal. 411, 60 Pac. 1034, 134 Cal. 31, 66 Pac. 4. See *McDermot v. Barton*, 106 Cal. 194, 39 Pac. 538.)

§ 519. **Order of sale unnecessary.** The authority of the sheriff to sell mortgaged real estate under foreclosure proceedings is derived from the decree of foreclosure, and not from the order of sale issued by the clerk of the court. *Passumpsic Savings Bank v. Maulick*, 60 Neb. 469, 83 Am. St. Rep. 539, 83 N. W. 672, was an appeal from an order of the dis-

strict court confirming a sale of real estate by the sheriff under foreclosure. The seal of the court was omitted from the order of sale, and it was insisted that it was therefore void and did not confer upon the sheriff power to advertise and sell the mortgaged property. "Conceding this proposition to be sound," said the court, "it does not follow that the order of confirmation should be set aside. The sheriff's authority was not derived from the order of sale, but from the decree. If the sale was made in pursuance of the decree it was the duty of the court to ratify it regardless of irregularities in the process issued by the clerk. The issuance of the order of sale was unnecessary and the infirmity in question was without prejudice to the rights of the appellant. (*Rector v. Rotton*, 3 *Neb.* 171; *Fried v. Stone*, 14 *Neb.* 398, 15 *N. W.* 698; *Johnson v. Colby*, 52 *Neb.* 327, 72 *N. W.* 313; *Amoskeag Savings Bank v. Robbins*, 53 *Neb.* 776, 74 *N. W.* 261; *Jarrett v. Hoover*, 54 *Neb.* 65, 74 *N. W.* 729; *Bristol Savings Bank v. Field*, 57 *Neb.* 670, 73 *Am. St. Rep.* 539, 78 *N. W.* 254. In the first point of the *syllabus* to *Johnson v. Colby*, 52 *Neb.* 327, 72 *N. W.* 313, it is said: "A decree of foreclosure is sufficient authority in itself for its execution. No order of sale need issue, and if one be issued, a sale made thereunder will not be set aside for formal defects in the order, or for failure of the officer to follow entirely the command of the order, provided he follow the law and the decree."

§ 520. **When sale of franchise is to be made.** The sale of any franchise under execution must be made in the county in which the corporation has its principal place of business or in which the property

or some portion thereof upon which the taxes are paid is situated. (*California. Civ. Code, sec. 393.*)

§ 521. **Franchise may be sold under execution.** For the satisfaction of any judgment against any person, company, or corporation authorized to receive tolls, the franchise and all rights and privileges thereof may be levied upon and sold under execution in the same manner and with the same effect as any other property. (*California. Civ. Code, sec. 388.*)

A franchise is personal property not capable of manual delivery. (*See Gregory v. Blanchard, 98 Cal. 311, 33 Pac. 199.*) Subdivision 5 of section 542 of the Code of Civil Procedure provides for attachment of personal property not capable of manual delivery by garnishment.

§ 522. **Good-will of business is property.** Section 993 of the Civil Code declares that the good-will of a business is property, transferable like any other.

§ 523. **Effect of return without sale.** The return by the commissioner without sale cannot warrant the docketing of a deficiency judgment; and a judgment so docketed upon which execution is issued is properly vacated by the court and the execution quashed. (*Hubbard v. University Bank of Los Angeles, 125 Cal. 684, 58 Pac. 297.*)

§ 524. **Resale.** If a purchaser refuse to pay the amount bid by him for property struck off to him at a sale under execution the officer may again sell the

property at any time to the highest bidder, and if any loss be occasioned thereby the officer may recover the amount of such loss with costs from the bidder so refusing in any court of competent jurisdiction. (*California. Code Civ. Proc., sec. 695.*)

In Nebraska it appears to be the duty of the sheriff in the event of the non-payment of the bid "to at once resell the property." He cannot wait until the sale is closed and the bidders have departed before again offering the property for sale. In those states whose statutes provide that execution sales shall take place between specified hours of the day, if a bidder refuses or fails after demand to make payment, a resale may be made on the same day and within those hours and without any additional notice. The sheriff may, no doubt, immediately upon the acceptance of the bid, demand payment, and in case it is not made, then and there resell the property. (*2 Freeman on Executions, 3d ed., sec. 313g.*)

In *Weatherby v. Slape*, 58 N. J. Eq. 550, 78 Am. St. Rep. 627, 43 Atl. 898, the court decides that "if an officer strikes off real estate to the highest bidder at the time and place duly advertised for its sale under execution, and, after the persons there assembled have dispersed and gone, the officer returns to the place of sale because of the purchaser's failure to comply with his bid and the conditions of sale, and, shortly before the expiration of the advertised hour of sale, publicly announces that the sale is adjourned for two weeks, such adjournment is not legal, and the sale held under such notice is void. To render such adjourned sale legal, notice thereof must be given in the presence and hearing of the persons assembled at the time and place first fixed for the sale. The

length of an adjournment rests largely in the discretion of the officer, and unless it be for more than one week no notice of the adjournment beyond that given by the act of adjourning need be published; and even for longer adjournments subsequent publication in the newspapers of a statement of the parties to the cause and of the time and place of the adjournment, without any description of the property, is all that the statute requires."

Upon failure of a purchaser to comply with his bid the sheriff may resell on the same day within legal hours without readvertisement. (*Humphrey v. McGill*, 59 Ga. 649.)

Where the purchaser of land sold under execution fails to pay the amount of his bid to the sheriff it is the sheriff's duty to readvertise the property for sale and sell the same. (*Herdman v. Cooper*, 39 Ill. App. 330.)

A sheriff sold certain real estate on execution to B, who failed to pay the purchase money. A few days afterwards, without having adjourned the sale and without advertising it again, the sheriff re-exposed the property to sale and sold it to C, who had notice of the facts. *Held*, that the sale to C was void. (*Givan v. Crawford*, 5 Blackf. (Ind.) 260.)

Where, after making the highest bid at an execution sale, the bidder retracts and refuses to pay the money, it is the duty of the sheriff to again offer the property for sale. (*Downing v. Brown*, 3 Ky. (Hardin) 181.)

If a bidder fail to comply with his bid the sheriff need not wait as in case of no adjudication, but may sell again immediately. (*Defau v. Massicot*, 3 Mart. La. (O. S.) 289.)

§ 525. **Sales under foreclosure.** The course of procedure in making sales of property under foreclosure is the same as that provided for sales under writs of execution issued against real property of the judgment debtor, the notice of sale being published and posted and the sale conducted in all respects as provided in the statute, except so far as may be provided in the decree and order of sale. (*Heyman v. Babcock*, 30 Cal. 367.)

§ 526. **Levy not necessary.** It is not necessary that a sheriff should go upon the land to make a formal levy under a decree of foreclosure and order of sale of real property. The object of a levy is to create a lien upon the land—to indicate by some act of the officer the particular property which he intends to sell. When, however, the judgment itself designates the property which is to be sold, as in case of foreclosure, there is no occasion for a levy. (*Southern Cal. Lumber Co. v. Ocean Beach Hotel Co.*, 94 Cal. 217, 28 Am. St. Rep. 115, 29 Pac. 627.)

§ 527. **Sheriff's authority to make sale.** Under the chancery system a certified copy of the decree of foreclosure was furnished to the officer as his authority for making the sale, and he acted under the direct mandate of the court; and such is now the proper practice where no statutory provision is made on the subject. In California "when the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, or the material parts thereof, and directing the proper officer to execute the judgment by making the sale and applying the proceeds in conformity therewith." (*Code*

Civ. Proc., sec. 684.) "This 'writ' is neither styled an execution nor is it such in its nature," no levy being necessary in order to designate the property to be sold; neither is it subject to the statutory provisions as to the time of return of executions. (*Southern Cal. Lumber Co. v. Ocean Beach Hotel Co.*, 94 Cal. 217, 28 Am. St. Rep. 115, 29 Pac. 627.)

The prevailing practice in California under the section quoted has been for the clerk to issue a writ, commonly known as the "order of sale," similar in form to an execution, referring briefly to the decree, and accompanied by a certified copy thereof, and commanding the sheriff to sell the property described in the decree, according to its terms and requirements. Neither the description of the property nor the amount of the judgment appears in such writ.

Since the rendition of the decision last cited (94 Cal. 217, 28 Am. St. Rep. 115, 29 Pac. 627), some doubt has prevailed as to the regularity of the practice as above stated, and some attorneys have insisted that the writ or "order of sale" issued by the clerk shall itself contain all the material parts of the decree, no copy of the latter being sent with it to the sheriff. In that case, however, the court say that in the code provision quoted there is preserved the distinction between the mode of executing a common-law judgment, to wit, by writ of execution, and a decree in equity; that the officer in making the sale is only executing the directions of the court just as under the chancery system the officer acted under the direct mandate of the court, his only authority being a certified copy of the decree. It is also worthy of notice that the only point decided by the court in that case was that the sale should not be set aside on

the sole ground that it was made after the return day named in the writ.

Further, in deciding the case of *Tregear v. Etiwanda Water Co.*, 76 Cal. 537, 9 Am. St. Rep. 245, 18 Pac. 658 (1888), the same court had said: "The practice of the courts in this state in directing the sale of encumbered property under foreclosure proceedings has not been uniform. . . . Under section 684 of the Code of Civil Procedure, a writ reciting the judgment, or the material part thereof, and directing the officer to execute the judgment, by making the sale, etc., is the proper course. By analogy to the former equity practice, this writ is usually termed an order of sale. Plaintiff so calls it in his complaint, and, as we think, properly."

The case of *Heyman v. Babcock*, 30 Cal. 367 (1866), involved a foreclosure sale in 1856, when the statute provided that where the judgment requires the performance of any act other than the payment of money, a certified copy of the judgment may be served upon the officer, and his obedience thereto enforced. (*Practice Act*, sec. 213.) In that case the court say that the general rule that process is the proper authority of the sheriff applies to foreclosure cases; that when no express provision is made either by law or in the decree prescribing the mode of making sale, "the sheriff acts under and by virtue of an order of sale issued upon the decree"; that this practice "has been too long adopted and too uniformly acquiesced in to be now changed by the court on the ground that it was not fully authorized by that act."

It would seem, therefore, that, considering these cases, either with reference only to the points actu-

ally decided, or giving full effect to the *obiter dicta*, they are not only not in conflict with the prevailing practice as hereinbefore outlined, but would appear to sustain it. In whichever form the writ or decree comes to the hands of the officer, however, he should execute its mandates if it comes under seal of the court and properly attested.

§ 528. **Prompt return after sale.** The sheriff should make his return as soon as the sale, delivery, and filing of the certificate of sale are accomplished, to enable the plaintiff to have docketed any deficiency that may exist against the judgment debtor. The plaintiff in most cases is entitled to an execution for the deficiency, and if the judgment debtor has other property that may be levied upon, the plaintiff may expect such promptness on the part of the officer as will enable him to secure the remainder of his judgment, if it can be made. Any undue delay in making the return may entail loss upon the plaintiff, for which the sheriff would be responsible.

§ 529. **Time for return unlimited.** When the statute provides that a judgment for the sale of specific property, as in cases of foreclosure, may be enforced by a "writ reciting such judgment" (*Code Civ. Proc.*, sec. 684), such "writ" is not an "execution" which must be enforced and returned within the statutory time. (*Southern Cal. Lumber Co. v. Ocean Beach Hotel Co.*, 94 Cal. 217, 28 Am. St. Rep. 115, 29 Pac. 627.)

§ 530. **Second order of sale.** A second order of sale may issue if the first order of sale be not exe-

cuted. Such second order might in some cases be ground of objection on the score of costs, but it is not objectionable as affecting the validity of the sale. (*Shores v. Scott River Water Co.*, 17 Cal. 626.)

§ 531. **Order of sale—Designation by judgment debtor.** A statute providing that the judgment debtor may direct the order in which property, personal or real, shall be sold, and that the sheriff shall follow his directions, is applicable to a foreclosure sale when the decree is silent as to such order. A sale not so conducted is not void, but merely voidable, and on timely motion the court should ordinarily set it aside. (*Marston v. White*, 91 Cal. 37, 27 Pac. 588.)

The well-established rules in equity proceedings require in foreclosure cases not only that the property should be sold in parcels, but that the property included in the first mortgage should be exhausted before recourse is had to the second. (*Raun v. Reynolds*, 11 Cal. 14. See, also, sec. 572, post.)

In the absence of any statutory provision as to the manner of making sale under foreclosure the court has jurisdiction to provide in the decree that the property be sold either in one or in several parcels, and the officer making the sale is bound to follow such directions. (*Hopkins v. Wiard*, 72 Cal. 259, 13 Pac. 687.)

§ 532. **Sale of both real and personal property.** When a mortgage covers both real and personal property both may be sold under decree of foreclosure and transferred by the sheriff's deed, if no redemption be made. (*Tregear v. Etiwanda Water Co.*, 76 Cal. 537, 9 Am. St. Rep. 245, 18 Pac. 658.)

§ 533. **Appeal—Stay of proceedings.** Under the California practice (*Code Civ. Proc.*, sec. 945), when a decree of foreclosure provides for a deficiency judgment, execution cannot be stayed unless the undertaking on appeal provide for the payment of the deficiency. (*Spence v. Scott & Kowalsky*, 95 Cal. 152, 30 Pac. 202.)

§ 534. **Title conveyed by foreclosure sale.** When a mortgage conveys the estate in fee the title of a purchaser at a foreclosure sale relates back to the date of the mortgage, and he acquires all the estate vested in the mortgagor at that time and also that which he may have subsequently acquired. (*Barnard v. Wilson*, 74 Cal. 512, 16 Pac. 307. See, also, sec. 503, *ante*.)

The deed of the sheriff passes fixtures subsequently annexed by the mortgagor. (*Sands v. Pfeiffer*, 10 Cal. 259.)

§ 535. **Removal of improvements.** The severance and removal of a house from the freehold changes the character of the house from real to personal property, whether the severance is by the act of God or of man.

A house on a mortgaged lot in Sacramento was carried by the flood in 1862 into the street, a short distance from the lot. The owner made a contract with one Lowell to sell him the house, and Lowell was about to remove it when the mortgagee brought an action to foreclose the mortgage and to restrain the removal. At the trial the court rendered a judgment against the owner of the lot for the amount due on the note, and a decree for the foreclosure of the

mortgage and for the sale of the mortgaged property, excepting the house, and as to that it was ordered that the decree should not affect nor authorize its sale. The judgment was affirmed on appeal and it was held that the severance and removal of the house withdrew the house from the operation of the mortgage lien, and that after the removal the mortgagor or his assignee had a right to sell the house, and the purchaser to convert it to his own use. (*Buckout v. Swift*, 27 Cal. 434, 87 Am. 90.)

§ 536. **Mortgage of partner's interest.** If two or more persons are partners in the ownership and management of real estate, and owe partnership debts, and one of the partners mortgages his interest in the property to secure his individual debt, the mortgagee acquires only the mortgagor's interest in the surplus after the payment of the partnership debts; and if these equal or exceed the value of the property and it is afterwards sold by the partners to pay the partnership debts, the mortgagee as against the purchaser holds no interest in the property liable in equity to be sold, and the mortgage cannot be foreclosed. (*Jones v. Parsons*, 25 Cal. 100.)

§ 537. **Redemption.** After foreclosure sale redemption may be made in the same manner and by the same persons as in case of sales under writ of execution, which subject is treated in this work in the chapter on "Redemptions." (*McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655; *Calkins v. Steinbach*, 66 Cal. 117, 4 Pac. 1103.)

§ 538. **Rights of mortgagor.** A mortgagor, after a sale of the mortgaged premises under a decree in a suit to foreclose the mortgage, has the right to the use and possession of the mortgaged premises until the execution of the sheriff's deed, but he possesses no right to despoil the property of its fixtures. (*See, also, secs. 490, 491, ante.*)

§ 539. **Sale by commissioner.** Under the practice in California since 1893 the court may by its judgment or at any time after judgment appoint a commissioner to sell the encumbered property. If such commissioner be appointed he shall sell it in the manner provided by law for the sale of like property by the sheriff upon execution, and the provisions of chapter 1, title 9, part II of the Code of Civil Procedure, relating to execution sales, are made applicable to sales made by such commissioners, and the powers therein given and the duties therein imposed on sheriffs are extended to such commissioners. (*Code Civ. Proc., sec. 726.*) "The commissioner, before entering upon his duties, must be sworn to perform them faithfully, and the court making the appointment shall require of him an undertaking, with sufficient sureties, to be approved by the court, in an amount to be fixed by the court, to the effect that he will faithfully perform the duties of commissioner, according to law. Within thirty days after such sale, the commissioner must file with the clerk of the court in which the action is pending a verified report and account of the sale, together with the proper affidavits, showing that the regular and required notice of the time and place of the sale was given, which report and account shall have the same force and effect

as the sheriff's return in sales under execution. In all cases of sales made by a commissioner, the court in which the proceedings are pending shall fix a reasonable compensation for the commissioner's services, but in no case to exceed the sum of ten dollars." (*Code Civ. Proc.*, secs. 726, 729.)

§ 540. **How sale should be conducted.** In California all sales of property under execution must be made at auction to the highest bidder, between the hours of nine in the morning and five in the afternoon. If the sale cannot be completed in one day it may be postponed until the next day without posting notices of the postponement, if there are persons present to receive the proclamation of the postponement.

"After sufficient property has been sold to satisfy the execution, no more can be sold under that writ. Neither the officer holding the sale, nor his deputy, can become a purchaser or be interested in any purchase at such sale. When the sale is of personal property, capable of manual delivery, it must be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price. The judgment debtor, if present at the sale, may direct the order in which property shall be sold, when such property consists of several lots or parcels, or of articles which can to advantage be sold separately, and the sheriff must follow such directions." (*Code Civ. Proc.*, sec. 694.)

§ 541. **Penalty for selling without notice.** An officer selling without giving the statutory notice forfeits five hundred dollars to the aggrieved party in

addition to his actual damages. (*California. Code Civ. Proc., sec. 693.*)

The remedy against a sheriff for selling property on insufficient notice is confined to the statutory remedy. (*Smith v. Randall*, 6 Cal. 47, 65 Am. Dec. 475; *affirmed in Shores v. Scott River Water Co.*, 17 Cal. 626; *also cited as authority in Satterlee v. San Francisco*, 23 Cal. 320; *and see Herzo v. San Francisco*, 33 Cal. 140.) The statute provides an adequate remedy in such cases by an action against the officer, and the party aggrieved is entitled to no other remedy. The purchaser at such sale is not the "aggrieved party" within the meaning of the law. The parties to the execution are the "aggrieved parties." (*Kelly v. Desmond*, 63 Cal. 517.)

In computing the time of giving notice of the sale the day on which the sale is made should be excluded.

§ 542. **Sale after return day—When valid.** A levy made at any time before the return day of the writ is good, but a levy made after the return day will not be good unless the delay has been caused by a stay of proceedings. Where property has been levied upon and there is not sufficient time between the date of the levy and the return day, the officer may nevertheless proceed to advertise and sell the property under the writ, and the sale will be valid. (*Freeman on Executions, sec. 106; Southern California Lumber Co. v. Ocean Beach Hotel Co.*, 94 Cal. 221, 28 Am. St. Rep. 115, 29 Pac. 627.)

§ 543. **Postponement of sale.** If there are no bidders when property is offered at sheriff's sale the sale may be postponed from day to day or to a future

day named; but where publication of the notice of sale is required to be made once a week, for instance, the publication must be continued every week with an additional postponement notice.

When the only bids made are palpably disproportionate to the value of the property the officer should adjourn the sale. In the case of real property the officer may be unable to judge of the sufficiency of the bid, for the reason that the property may be covered with mortgages. But in the case of personal property an approximate estimate of its value may be arrived at by the officer. Inadequacy of price alone is sufficient to authorize a court to set aside a sale. A sale should be postponed where there are indications on the part of bidders of collusion to depreciate the sale to an unreasonable extent, or when the officer has reason to believe that he can realize more by a sale at a future day.

§ 544. **Resale where bidder refuses to pay.** "If a purchaser refuse to pay the amount bid by him for property struck off to him, . . . the officer may again sell the property at any time to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss, with costs, from the bidder so refusing, in any court of competent jurisdiction," and "when a purchaser refuses to pay, the officer may, in his discretion, thereafter reject any subsequent bid of such person." (*California. Code Civ. Proc., secs. 695, 696.*)

§ 545. **The title the purchaser secures.** A sale of personal property passes to the purchaser only such title as the judgment debtor had on the day the

attachment or execution was levied, and it transfers only what the debtor himself could have transferred. (*Lowenberg v. Greenebaum*, 99 Cal. 165, 37 Am. St. Rep. 42, 33 Pac. 794, 21 L. R. A. 399; *Freeman on Executions*, sec. 112; *California. Code Civ. Proc.*, secs. 698-700.)

§ 546. **Judgment is payable in money only.** A sheriff, under his general powers, cannot take anything but legal currency in satisfaction of an execution, and where he takes a note, indorses it on the execution, and then returns it satisfied, the return is not conclusive, and perhaps not *prima facie* evidence of satisfaction, unless it shows some authority for receiving the note. (*Mitchell v. Hackett*, 14 Cal. 661.)

§ 547. **Application of proceeds—Conflicting attachments.** When a sheriff receives money on execution sale of property levied on by virtue of attachments, it is his duty to apply the money in the order of the attachments. Where there are several attachments and the officer receives notice that the senior attachment is defective he should make inquiry thereon and satisfy himself that he can safely pay the money upon such senior attachment. For if he pay over money upon a void writ, he will be responsible to the plaintiffs under the junior writs, notwithstanding the fact he may urge in excuse that the senior writ was regular upon its face.

It is not only a frequently quoted principle of law, but a statutory enactment, that "a sheriff or other ministerial officer is justified in the execution of, and must execute, all process and orders regular on their

face, and issued by competent authority, whatever may be the defect in the proceedings upon which they were issued."

However bright and clear the protective halo of light that is shed upon the officer's pathway in this broad and unambiguously worded declaration, officers frequently stumble into difficulties by serving process regular on their face and issued by courts of competent authority. For it is an equally settled principle that no person can be divested of his rights except by due process of law; and officers are often called upon to carry out the judgments of courts under the authority of writs regular on their face which have been wrongfully issued. (*See, also, sec. 345, ante.*)

In *Buffandeau v. Edmundson*, 17 Cal. 441, 79 Am. Dec. 139, the court say: "It is no part of the sheriff's duty to sit in judgment upon official acts and reform the errors or revise the orders of a judge." Yet, while a sheriff may not question the validity of a writ, he is bound to protect himself from loss sought to be put upon him while in the faithful discharge of his duties.

In an action on a sheriff's bond in the case of *McComb v. Reed*, 28 Cal. 281, 87 Am. Dec. 115, judgment was rendered against the officer and his sureties for not applying moneys received under execution upon plaintiff's judgment. There were two writs of attachment under which the property was taken, the money realized on the sale being applied to the junior writ. The reason assigned by the sheriff was that the complaint which was served with the summons in the first case did not set up a cause of action which would warrant the issuance of an attachment. The court

held, notwithstanding, that the writ was not void, and that a sheriff who receives an attachment regular on its face cannot pay over the money obtained by him from the sale of property levied on by virtue of the writ to a junior attaching creditor, because the complaint in the action on which the first attachment was issued did not set forth a cause of action upon which an attachment could issue.

The application of an attaching creditor to compel the sheriff to pay over the proceeds of goods attached, there being conflicting claims between several attaching creditors, may be made by motion. If notice of the motion is not given by the party moving to the other attaching creditors it is the duty of the sheriff to do so, if he wishes the decision to bind them. (*Dixey v. Pollock*, 8 Cal. 570.)

§ 548. **Conflicting process from different courts.** One court cannot enjoin the process of another court of co-ordinate jurisdiction, much less seize the proceeds of such process. (*Weaver v. Wood*, 49 Cal. 300.) If two attachments, issued out of different courts at different times, are placed in a sheriff's hands and both are levied on the same personal property, and the court out of which the latest attachment issues orders the property sold and the proceeds deposited with its clerk and the sheriff obeys, and the money is paid to the second attaching creditor, the sheriff is liable to the first attaching creditor for the amount for which he recovers judgment or for the amount of the proceeds, if less than the amount of the judgment. The court from which the second attachment issues may make an order of sale of the property, but it has no power to dispose of the fund

arising from the sale other than the surplus remaining after the claim of the first attaching creditor is satisfied. In the case of *Weaver v. Wood*, the sheriff of Solano County had two attachments issued out of different courts, and by order of the court from which the second attachment issued sold the property and paid the money into the court, from which it was paid to the plaintiff in the second attachment. As a consequence the sheriff was compelled to satisfy the first attachment out of his own pocket. On appeal the supreme court decided that the sheriff, having both attachments in his hands, knew the extent of the demand of the first attaching creditor and must be held to have known that the fourth district court could only deal with the excess of the proceeds of the sale over that demand. (*Weaver v. Wood*, 49 Cal. 297.)

§ 549. **Payment into court — Disobedience of void order.** In the case of *Brown v. Moore*, 61 Cal. 432, an application for a writ prohibiting the respondent from proceeding further in the matter of certain contempt proceedings against the petitioners, the court rendered the following opinion:—

“From the verified petition it appears that during the month of April, 1882, sundry suits at law were commenced by divers persons, against one Bartlett, in the justices’ courts of Amador County to recover certain moneys alleged to be due from Bartlett to the respective plaintiffs in those suits. Judgment passed for the plaintiffs therein, on which executions were issued and placed in the hands of the petitioners in the present proceedings, who are constables in and for the respective towns of Amador County, in which are established the justices’ courts that ren-

dered the judgments. The executions thus issued and delivered to the petitioners were by them, as such constables, levied on certain personal property of Bartlett. On the 22d of May, 1882, a judgment was entered in the superior court of Amador County against Bartlett and in favor of one Post, for a money demand; and on this judgment execution was issued on the same day and delivered to the sheriff of Amador County. The sheriff, on the 24th of May following, levied his writ by delivering to each of the constables (petitioners here) a copy of the same, together with a notice that all the property of the defendant (Bartlett) in their possession and under their control was attached in pursuance of such execution, and demanded of them the possession of the property. The constables refused to deliver the property to the sheriff, and the next day the latter returned the writ to the superior court, stating in his return, substantially, the facts as above given. On the 27th of May, on an affidavit made on behalf of Post setting forth that the judgments rendered by the justice's court were void, the judge of the superior court made an order directing the constables to appear before him on the 29th of the same month and show cause why they should not surrender the property to the sheriff. On the day named they appeared and filed their several affidavits, declaring that they were not debtors of Bartlett, nor had they any property of his other than that levied on and held by them under and by virtue of the executions first above mentioned. Thereupon the judge refused to direct the constables to deliver the property to the sheriff, but on the same day entered an order in the following words: 'It is ordered, adjudged, and decreed that plaintiff here-

in (Post) is authorized to institute an action against each of said persons, to wit: C. L. French, constable; H. B. Templeton, constable; W. H. Brown, constable; and W. Payton, his deputy constable, to determine whether or not the said persons hold and retain said property adversely to the defendant—said suits to be commenced within thirty days from the date of this order. And it is further ordered that each of said constables is given leave to sell the said property in their possession belonging to said defendant under the alleged executions in their hands, and they, and each of said constables, is ordered to pay all the proceeds of said sales of property to the clerk of the court within ten days after the sale thereof.'

"A motion was subsequently made on behalf of the constables that that portion of the order of May 29th purporting to authorize them to sell the property in their possession under the writs of execution in their hands, and requiring them to pay the proceeds of such sales to the clerk of the superior court, be set aside on the ground that the court had exceeded its jurisdiction in so ordering. This motion was denied.

"The constables sold the property under and by virtue of the executions held by them, and applied the proceeds to their satisfaction, instead of paying them to the clerk of the superior court, as directed by the order of May 29th; and upon these facts being brought to the notice of the superior court, that court made an order to the effect that the constables be brought before the court at a time stated, and show cause why they should not be adjudged guilty of contempt of court in failing and refusing to pay the proceeds of the sales of the property to the clerk, and further directing a warrant of attachment to be

issued and delivered to the sheriff, commanding him forthwith to arrest the constables and hold them in his custody, unless they should execute an undertaking in the sum of one hundred dollars each for their appearance on the day named.

"The superior court, in making the orders complained of by the petitioners, was proceeding under the supposed authority of sections 717 and 720 of the Code of Civil Procedure. Even if it be admitted that those sections have any application to an officer holding property of a judgment debtor by virtue of a legal process issued against him, neither of them confers on the court the power to order such property sold, nor to direct that the proceeds of it be paid to the clerk of the court. (*Hartman v. Olvera*, 51 Cal. 501.) The superior court, therefore, exceeded its power in making the order requiring the petitioners to pay to the clerk of the superior court the proceeds of the property sold under the executions held by them against Bartlett. For the disobedience of that void order the petitioners could not be lawfully punished for contempt. The proceedings looking to that end should, therefore, be arrested. (*Williams v. Dwinelle*, 51 Cal. 422; *Quimbo Appo v. People*, 20 N. Y. 531.) Demurrer overruled."

§ 550. **Senior and junior writs.** When an officer has levied upon property, he may hold the same under subsequent writs that may come into his hands, so long as the first levy remains thereon. The receipt of subsequent writs operates as constructive levies upon the goods taken under the prior writ.

If a second execution be delivered to a sheriff after he has the defendant's goods in possession under the

prior execution of another, the goods are bound by the second execution, subject to the first execution.

Where A and B issue separate executions, and both are levied upon the same property at different times, and the prior execution of A is set aside, B is entitled to be paid as if he were the sole execution creditor.

When a second execution is levied upon certain goods, and the proceeds afterwards exhausted by the first execution, the sheriff's return of *nulla bona* upon the second execution is proper.

Where there are several writs of attachment levied upon property, the first writ levied holds the property to satisfy the judgment that may be recovered under that writ; and when an execution is issued against the property, whether it be in the case of the first attachment, or in any other, the property may be sold under such execution; but under whatever execution the property be sold, the judgment under the first attachment must be satisfied first, and the proceeds of the sale must be held by the officer for that purpose until the judgment under the first attachment is rendered, or the case otherwise disposed of. The judgments under the senior writs of attachment are to be satisfied in the order in which they are levied.

§ 551. **Payment of proceeds of the sale.** If the sheriff neglects or refuses to pay over on demand to the person entitled thereto any money which may come into his hands by virtue of his office (after deducting his legal fees), the amount thereof, with twenty-five per cent damages and interest at the rate of ten per cent per month from the time of demand,

may be recovered by such person. (*California. Pol. Code, sec. 4181.*)

§ 552. **Surplus to be returned to the defendant.** When the lien of an attachment is satisfied, the property not disposed of in satisfaction of the lien, as well as the surplus moneys that may remain after the sheriff's sale and satisfaction of the debt, remain subject to the rights of the judgment debtor or his assignee. (*Sexey v. Adkison, 40 Cal. 408.*)

§ 553. **Death of the defendant after levy.** The death of the judgment debtor after levy of execution does not affect the lien or relieve the sheriff of his obligation to sell the property. (*Vermont Marble Co. v. Superior Court, 99 Cal. 579, 34 Pac. 326.*)

§ 554. **Computation of interest on judgment.** The statutory interest on the judgment is to be computed from the date of its entry, and not from the date of the rendition or signing.

§ 555. **Sales—When valid and when void.** Sales to a *bona fide* purchaser under *voidable* executions are *valid*, though the executions be afterwards set aside, but sales under *void* executions are *invalid* and pass no title, even to a *bona fide* purchaser.

§ 556. **Sale of choses in action.** Wherever choses in action are liable to levy and sale, they must be in possession of the officer at the sale, to be exhibited to the bystanders and assigned to the purchaser, unless a full and accurate description of the particular interest (where it is a contingent and complicated contract) and chose in action, with all its conditions and

covenants, and a full explanation of the facts determining the value of the chose, be given by the levy and announced at the sale. In the case of *Crandall v. Blen*, 13 Cal. 20, the sheriff levied by garnishment upon a written contract or agreement, but did not take any property into possession. Notices were posted and sale had and the agreement was struck off to the plaintiff. The agreement was not present at the sale, nor fully explained to the bystanders. The court held that no title whatever passed by the sale.

§ 557. **Sale of toll-road.** A franchise may be treated as property and sold under execution. Section 388 of the California Civil Code provides that "For the satisfaction of any judgment against any person, company, or corporation, having any franchise other than the franchise of being a corporation, such franchise, and all the rights and privileges thereof, may be levied upon and sold under execution, in the same manner, and with the same effect, as any other property." The sheriff is required to give to the purchaser at such sale a certificate of purchase. Such sale must be made in the county in which the corporation has its principal place of business, or in which the property or some portion thereof, upon which the taxes are paid, is situated. (*California. Civ. Code, secs. 389, 393.*)

§ 558. **Proceeds of mortgaged property.** When personal property mortgaged is sold at foreclosure sale, the officer must apply the proceeds of the sale as follows: (1st) To the repayment of the sum paid to the mortgagee, with interest from the date of such payment; and (2d) the balance, if any, in like manner as the proceeds of sales under execution are ap-

plied in other cases. (*California. Civ. Code, sec. 2970.*)

§ 559. **Execution sales of vessels.** When an attachment has been levied upon a steamer, vessel or boat, and "the attachment be not discharged, and a judgment be recovered in the action in favor of the plaintiff, and an execution be issued thereon, the sheriff must sell at public auction, after publication of notice of such sale for ten days, the steamer, vessel or boat, with its tackle, apparel and furniture, or such interest therein as may be necessary, and must apply the proceeds of the sale as follows:—

"1. When the action is brought for demands other than the wages of mariners, boatmen, and others employed in the service of the steamer, vessel, or boat sold, to the payment of the amount of such wages, as specified in the execution.

"2. To the payment of the judgment and costs, including his fees.

"3. He must pay any balance remaining to the owner, or to the master, agent, or consignee, who may have appeared on behalf of the owner, or if there be no appearance, then into court, subject to the claim of any party or parties legally entitled thereto." (*California. Code Civ. Proc., sec. 824.*)

The notice of sale published by the sheriff must contain a statement of the measurement and tonnage of the steamer, vessel or boat, and a general description of her condition. (*California. Code Civ. Proc., sec. 327.*)

§ 560. **Preferred claims against vessels.** The only preference given over the judgment creditor, in

execution sales of vessels, is in the case of claims for wages of mariners, boatmen, and others employed in the service of the vessel, which must be first paid, provided verified claims be filed as provided in sections 825 and 826 of the Code of Civil Procedure. (*See Fisher v. White*, 8 Cal. 418.)

§ 561. **Purchaser entitled to certificate of sale.** When the purchaser of any personal property capable of manual delivery pays the purchase money, the officer making the sale must deliver to the purchaser the property, and, if desired, execute and deliver to him a certificate of the sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied. If the sale is of personal property not capable of manual delivery, the officer on receipt of the purchase money must execute and deliver to the purchaser a certificate of sale, and such certificate conveys all the right which the debtor had in such property on the day the execution or attachment was levied. (*California. Code Civ. Proc., sec. 698, 699.*)

A sheriff's bill of sale of personal property sold on execution need not contain all the formalities of a regular certificate. (*Lay v. Neville*, 25 Cal. 546.)

§ 562. **Liability for wrongful sale.** An officer is liable to the owner of personal property for the seizure and sale thereof under an execution against a third party, and he is not relieved from liability by professing to sell only the "right, title and interest" of the defendant.

§ 563. **Notice of sale under execution.** Before the sale of real property under a writ of execution notice thereof must be given as follows: By posting written notice of time and place of sale, "particularly describing the property, for twenty days, in three public places of the township or city where the property is situated, and also where the property is to be sold, and publishing a copy thereof once a week for the same period, in some newspaper of general circulation, printed and published in the city or township in which the property is situated, if there be one, or, in case no newspaper of general circulation be printed and published in the city or township, in some newspaper of general circulation printed and published in the county." (*California. Code Civ. Proc., sec. 692; Stats. 1907, p. 980.*)

§ 564. **When and how real property must be sold.** "All sales of property under execution must be made at auction to the highest bidder, between the hours of nine in the morning and five in the afternoon. After sufficient property has been sold to satisfy the execution, no more can be sold. Neither the officer holding the execution nor his deputy can become a purchaser or be interested in any purchase at such sale. When the sale is of personal property, capable of manual delivery, it must be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, consisting of several known lots or parcels, they must be sold separately; or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion must be thus sold. The

judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and the sheriff must follow such directions." (*California. Pol. Code, sec. 694.*)

§ 565. **Sale without notice.** Under the California practice, section 692 of the Code of Civil Procedure prescribes the manner in which notice of sale must be given, and section 693 provides that "an officer selling without the notice prescribed by the last section forfeits five hundred dollars to the aggrieved party, in addition to his actual damages." Similar provisions also exist in other states.

§ 566. **Purchaser not an aggrieved party.** The statutory provision relating to recovery of penalty for officer selling real property under execution without notice does not apply to the purchaser at execution sale without notice. Such purchaser is not the "aggrieved party" within the meaning of the section. The parties to the execution are the "aggrieved parties." (*Kelly v. Desmond, 63 Cal. 517.*)

§ 567. **Recovery for sale without notice.** When the statute fixes a penalty or forfeiture for making sale without notice, an action cannot be maintained by the defendant in an execution to recover of the officer the penalty prescribed for selling without proper notice, unless by a sale so made the complainant has been deprived of his property. If the attempted sale is a nullity and passes no title, no injury has been sustained, and no right of action for the

forfeiture accrues. No right of property at an execution sale vests in the purchaser until he pays the purchase money, and until this is done the sale is not so far perfected as to constitute the foundation of an action against the officer to enforce a forfeiture for selling without the prescribed notice. (*Askew v. Ebberts*, 22 Cal. 263. See, also, sec. 566, ante.)

§ 568. **Sales under two or more executions.** When an officer has two or more executions levied upon the same property, he may advertise the same for sale in one series of notices; and the notice should describe the judgments and titles of the different cases under which the levies were made.

§ 569. **Setting aside sheriff's sale.** A court of equity will not set aside a sheriff's sale and a deed executed under it in a collateral action commenced for that purpose, by reason of irregularities in the conduct of the officer in making the levy and sale. (*Boles v. Johnson*, 23 Cal. 226, 83 Am. Dec. 111.)

§ 570. **Irregularities of sale—Remedy.** If parties have any remedy under such circumstances, it is by motion, properly made in the court where the judgment was rendered, to set aside the sale. (*Id.*)

§ 571. **Justice's court sale — Transcript.** Real estate of a judgment debtor situated in the county where the judgment before a justice of the peace was rendered may be sold on execution upon the judgment, whether a transcript of the judgment be filed in the office of the recorder of such county or not. (*Campbell v. Wickware*, 19 Cal. 145.) No filing

of such transcript with the recorder is necessary, except as to property situated in a different county.

§ 572. **Sale to be made in parcels.** Statutory provision is usually made that in case of sale of "real property, consisting of several known lots or parcels, they must be sold separately." (*California. Code. Civ. Proc., sec. 694.*) A sale not so conducted is not void, however, but merely voidable, and on timely motion the court should ordinarily set it aside upon proper showing. While the rule, when laid down by statute, is controlling and should be strictly followed, it does not apply where each distinct parcel is first offered for sale separately, and no bids are received. In such case the property may then be offered and sold as a whole. (*Ontario Land and Improvement Co. v. Bedford*, 90 Cal. 181, 27 Pac. 39; *Marston v. White*, 91 Cal. 37, 27 Pac. 588.)

§ 573. **Sale in mass by agreement.** Frequently at sheriff's sales property consisting of separate parcels is sold in mass by agreement of the plaintiff and defendant in the execution, and where such sales are made, the defendant is estopped from complaining. It is not always a safe plan to pursue, however, as the judgment debtor in the execution may have other creditors who would be injured by such a course.

§ 574. **Debtor may direct order.** Statutory provision is usually made to the effect that "the judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to

advantage separately." (*California. Code Civ. Proc., sec. 694.*)

§ 575. **Setting aside sale—Showing required.** A sale of property under execution will not be set aside because sold *en masse*, unless it appears that a larger sum would have been realized if the property had been sold in parcels or that the sale of less than the whole tract would have brought sufficient to satisfy the writ. (*Hudepohl v. Liberty Hill W. and Mg. Co.*, 94 Cal. 588, 28 Am. St. Rep. 149, 29 Pac. 1025.)

A sale in mass of real estate consisting of several known and distinct parcels at a price greatly below the actual value of the property cannot be sustained against the objection of the judgment debtor. Such sales are not absolutely void, but are voidable, and will be set aside upon reasonable and proper application when there is reasonable ground for belief that they were less beneficial to the creditor or debtor than they would have been had a different mode been pursued. (*San Francisco v. Pixley*, 21 Cal. 57.) In the case just cited the sheriff sold a tract of land belonging to the corporation, one mile in length and half a mile in width, which had long previous to the sale been laid out into blocks and streets and marked upon the official map, and sold the same in mass, for \$360, while the actual value was \$75,000. The sale was set aside on account of the manner in which it had been made.

Where the land sold under execution consisted of separate but adjoining tracts, but the sheriff and purchaser were ignorant of the subdivisions, and the defendant failed to inform the sheriff of the fact, or to direct a sale by parcels: *Held*, that the sale of the

land, in gross, was valid. (*Smith v. Randall*, 6 Cal. 47, 65 Am. Dec. 475. See, also, sec. 569, ante.)

576. **Unreasonable delay in application.** A sale of real property in mass will be set aside upon a proper application of the judgment debtor when made in reasonable time after the sale. Such a sale, however, will not be set aside if the application is not made within a reasonable time. It was held in *Vigoureux v. Murphy*, 54 Cal. 346, that where the application to avoid the sale was made more than three years after the sale by a cross-complaint to an action of ejectment brought by the successor of the purchaser the application came too late, though the sale should have been vacated had the application been made immediately on the return by the sheriff, and *perhaps* if it had been made within the time allowed for redemption.

§ 577. **Sheriff's sales not credit sales.** A purchaser at a sheriff's sale acquires no right whatever against the sheriff for property sold unless at the time of the sale he pays down in cash the whole of the purchase money. A sheriff, by our laws, in selling property under execution is not bound to receive any bid except for cash on the whole amount of the sale; and having received a bid with but a portion of the purchase money paid at the time, he may disregard the bid, and offer the property again for sale, if the balance of the purchase money is not paid before the return day of the execution. A sheriff is not bound to demand the purchase money before setting aside the bid, but the delay of the purchaser until the return day of the execution to pay the balance due will

be construed into a refusal on his part to pay the amount of his bid upon the property. (*People v. Hays*, 5 Cal. 67.)

In an action against a purchaser at sheriff's sale, for not paying the amount of his bid, it cannot be set up in defense that no sufficient notice of the sale was given. If such be the fact, the recourse of the purchaser is against the sheriff. (*Harvey v. Fisk*, 9 Cal. 94.)

§ 578. **Sale of leasehold interest — When absolute.** Upon a sale of real property the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto; and when the sale is less than a leasehold of two years' unexpired term, the sale is absolute. In all other cases the property is subject to redemption. (*California. Code Civ. Proc., secs. 700, 702.*)

§ 579. **Certificate of sale.** Section 700 of the California Code of Civil Procedure provides that upon the sale of real property under execution, "the officer must give to the purchaser a certificate of sale, containing: (1) A particular description of the real property sold; (2) the price bid for each distinct lot or parcel; (3) the whole price paid; (4) when subject to redemption, it must be so stated. And when the judgment under which the sale has been made is made payable in a specified kind of money or currency, the certificate must also show the kind of money or currency in which such redemption may be made, which must be the same as that specified in the judgment. A duplicate of such certificate must be filed by the officer in the office of the recorder of the county."

§ 580. **Title under sheriff's certificate of sale.** The purchaser of real property at a sheriff's sale who receives the sheriff's certificate of purchase has not a title to the property, but a lien on the same. (*Baber v. McLellan*, 30 Cal. 135.) The effect of such certificate is spent when the defendant in the judgment redeems.

§ 581. **Amendment of certificate.** A sheriff's certificate of sale made to the wrong person may be amended, but it cannot affect a redemption already made by payment to the person named in the original certificate of record. (*Pekin Mining Co. v. Kennedy*, 81 Cal. 356, 22 Pac. 679.)

§ 582. **Redemption.** The procedure for redemption of real property is treated at length in the chapter on that subject. (*Secs. 533-542, ante.*)

§ 583. **Resale on refusal of purchaser to pay.** If at the sale the purchaser refuses to pay the amount of the bid, the property may be offered for sale again at once if there are other bidders present. But if the officer learns of the refusal to make the payment after the time fixed for the sale has passed, notices of resale should be posted, and the property re-advertised. (*See, also, secs. 577, ante; sec. 584, post.*)

§ 584. **Recovery from bidder.** If a purchaser refuse to pay the amount bid by him for property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss be occasioned

thereby, the officer may recover the amount of such loss, with costs, from the bidder so refusing, in any court of competent jurisdiction. (*California. Code Civ. Proc., sec. 695.*)

§ 585. Sale passes interest acquired after levy. A sheriff, under an execution issued on a judgment which is not a lien, can only seize and sell such title and interest as the judgment debtor had in the land at the time of the levy and such as he acquired between the time of the levy and the sale.

If, after the levy of an execution by the sheriff on public land and before the sale the judgment debtor, being pre-emptioner, pays for the land levied on and obtains a certificate of purchase, the purchaser at the sheriff's sale succeeds only to the equitable title of the judgment debtor, who, when he obtains the legal title by means of the patent, holds it in trust for the purchaser at the sheriff's sale. (*Kenyon v. Quinn*, 41 Cal. 325.)

§ 586. Title of purchaser is not dependent on sheriff's return. The title of a purchaser of real estate at sheriff's sale does not depend upon the return of the officer to the writ. The purchaser has no control over the conduct of the officer in this respect. (*Cloud v. El Dorado Co.*, 12 Cal. 129, 73 Am. Dec. 526.) While it is undoubtedly the duty of the sheriff to make a return, and while it is important as evidence of a permanent and authentic character that he should do so, the title of the purchase does not depend upon his performance of this duty. The purchaser rests for title upon the judgment, execution, levy, sale, and deed; and he need show no more to

entitled him to whatever rights the defendant in execution had in the property sold. In Oregon and Washington, however, execution sales must be reported and confirmed at the next term of court.

§ 587. **Title when attachment irregular—Intervening purchaser.** Unless the record shows that the levy of attachment is made in accordance with the statute a purchaser at execution sale acquires no title as against the grantee of the attachment debtor by conveyance after attachment and before sale. (*Schwartz v. Cowell*, 71 Cal. 306, 12 Pac. 252.)

§ 588. **Conveyance by debtor after attachment.** If the judgment debtor make sale of real property after valid levy of attachment and before judgment, while no judgment lien will attach to the property, yet the title of a purchaser at execution sale will prevail over the title of such grantee of the debtor. (*Riley v. Nance*, 97 Cal. 203, 31 Pac. 1126, 32 Pac. 315.)

§ 589. **Purchaser's title dependent upon valid unsatisfied judgment.** A purchaser at an execution sale must see at his peril that there is a valid judgment in existence and that the same has not been vacated or satisfied in any way, directly or indirectly; otherwise the power to make the sale has been destroyed. (*Bullard v. McArdle*, 98 Cal. 355, 35 Am. St. Rep. 176, 33 Pac. 193.)

§ 590. **Rights of innocent purchaser.** An innocent purchaser of property sold under execution, who, as assignee of a redemptioner's right to a sheriff's deed, obtains title without notice of any irregu-

larity in the sale will be protected therefrom. (*Hudepohl v. Liberty Hill W. and Mg. Co.*, 94 Cal. 588, 28 Am. St. Rep. 149, 29 Pac. 1025.)

§ 591. **Relief of purchaser—Caveat emptor.** The doctrine of *caveat emptor* applies only to sales made upon valid judgments, and is usually invoked with reference to sales upon execution issued against the general property of a judgment debtor. In these latter cases a defect of title is no ground for interference with the sale or a refusal to pay the price bid. The purchaser takes upon himself all the risks as to the title and bids with full knowledge that in any event he only acquires such interest as the debtor possessed at the date of the levy or the lien of the judgment, and that he may possibly acquire nothing.

A somewhat different rule prevails in cases where particular property is the subject of sale by a specific adjudication, as where the interest of A in a certain tract is decreed to be sold. To the validity of a decree of this character the presence of A is essential; and where present, the decree binds him and is effectual by the sale it orders to transfer his estate. A valid decree in a mortgage case operates upon such interest as the mortgagor possessed in the property at the execution of the mortgage. That interest may not constitute a valid title—it may not in fact be of any value—and the purchaser takes that risk. To that extent the doctrine of *caveat emptor* applies even in those cases and in all cases of adjudication upon specific interests, but no further. The interest specifically subject to sale, whatever it may be worth, a purchaser is entitled to receive; it is for that interest he makes his bid and pays his money. (*Boggs v. Hargrave*, 16 Cal. 559. See, also, sec. 594, *post.*)

§ 592. **Relief in discretion of the court.** Where there has been a defect in the proceedings on an execution sale, rendering the purchaser's title defective, the nature and extent of the relief are matters resting very much in the sound discretion of the court. As a general rule the purchaser will be released and a resale ordered, or such new or additional proceedings directed as may obviate the objections arising from those originally taken, when the consequences of the mistake are such that it would be inequitable either to the purchaser or to the parties to allow the sale to stand. But when relief is sought in one action from a purchase made upon a mistake of law as to the effect of a decree rendered in another action, it seems that the ordinary rules as to mistakes of law should apply; and from such, courts of equity seldom relieve. (*Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540.)

§ 593. **When purchaser cannot recover.** In the case mentioned in the preceding paragraph it was held, also, that the purchasers cannot be reimbursed in the amount bid, even though they acted under a mistake as to the effect of the decree and sale thereunder; that their mistake was one of law, against which courts of equity seldom relieve in an independent action—the weight of authority in the United States being not to relieve, unless the mistake be accompanied with special circumstances, such as misrepresentations, undue influence or misplaced confidence.

§ 594. **Where misrepresentation used.** Where a party purchased real estate at an execution sale

upon the faith of the representations of the judgment creditor that his judgment was the first on the property, when in fact there were prior encumbrances on it of more than its value: *Held*, that the purchaser should be relieved, and the judgment creditor should be estopped from claiming an advantage resulting from his own misrepresentations. It makes no difference whether the misrepresentations were made willfully or ignorantly, or that the action against the purchaser was brought in the name of the sheriff. Ordinarily, the maxim of *caveat emptor* applies to judicial sales, but it has many limitations and exceptions. (*Webster v. Haworth*, 8 Cal. 21, 68 Am. Dec. 287. See, also, sec. 591, ante.)

§ 595. **Sheriff's deed.** "If no redemption be made within twelve months after the sale, the purchaser, or his assignee, is entitled to a conveyance; or, if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, and the time for redemption has expired, the last redemptioner, or his assignee, is entitled to a sheriff's deed." (*California. Code Civ. Proc., sec. 703.*)

§ 596. **Deed by successor.** "When the sheriff sells real estate under and by virtue of an execution or order of court, he, or his successors in office, shall execute and deliver to the purchaser or purchasers, all such deeds and conveyances as are required by law and necessary for the purpose, and such deeds and conveyances shall be as valid in law as if they had been executed by the sheriff who made the sale." (*California. County Govt. Act, sec. 107; Stats 1893, p. 373.*)

§ 597. **Deed relates back to attachment.** A sheriff's deed executed after execution sale in an attachment suit takes effect from the date of the attachment if the levy was such as to create a lien. (*Riley v. Nance*, 97 Cal. 203, 31 Pac. 1126, 32 Pac. 315.)

§ 598. **Cloud on title.** An officer is bound to levy upon the defendant's interest in real estate when instructed to do so even though the records may show *prima facie* that the defendant has transferred his interest in the property to a third party. But the party who has succeeded to that interest may have his remedy. There are numerous decisions in our own courts declaring the right of the party injured by such cloud upon title to his remedy. In *Pixley v. Huggins*, 15 Cal. 129, it is held that a deed from a sheriff upon an execution sale against the vendor of plaintiff would have the same effect in casting a cloud upon the title as if the deed were made directly by such vendor. Such a deed from the sheriff put on record would create doubts as to the validity as against the judgment creditor of the previous transfer to plaintiff.

The jurisdiction of a court to enjoin a sale of real estate is coextensive with its jurisdiction to set aside and order to be cancelled a deed of such property. It is not necessary for its assertion in the latter case that the deed should be operative if suffered to remain uncanceled to pass the title or that the defense to the deed should rest in extrinsic evidence liable to loss or be available only in equity. It is sufficient to call into exercise the jurisdiction of the court that the deed casts a cloud over the title of the plaintiff.

As in such case the court will remove the cloud by directing a cancellation of the deed, so it will interfere to prevent a sale, from which a conveyance creating such a cloud must result. Where property rights are thus involved the officer may resort for his protection to proceedings provided for in section 689 of the Code of Civil Procedure and secure indemnity.

A sheriff's sale of real property under a judgment for the foreclosure of a lien would not create a cloud upon the title or in any manner affect the rights of one owning the fee and in the actual possession of the land, but not a party to the judgment. (*Archbishop of San Francisco v. Shipman*, 69 Cal. 586, 11 Pac. 343.)

§ 599. **Satisfaction of mortgage by sheriff or commissioner.** Section 675a of the California Code of Civil Procedure provides: "Whenever a mortgage on real property is foreclosed in this state and the property covered by such mortgage is sold under and pursuant to the decree of foreclosure entered in the action in which such foreclosure is had, it shall be the duty of the sheriff, or commissioner [*Code Civ. Proc., sec. 726*] making the sale, as the case may be, within five days after the purchaser at the sale becomes entitled to a deed from such sheriff, or commissioner thereunder, to enter upon the margin of the county records where such mortgage is recorded, if the same be recorded, a satisfaction of the same. Such satisfaction shall be substantially in the following form:—

"Full satisfaction and discharge of the within mortgage by foreclosure is hereby entered this

.....day of..... 19..... Decree
 of foreclosure entered the.....day of.....
 19.... in cause No.... entitled vs.
 Sale under such decree had the
day of..... 19.....

“.....
 “Sheriff (Commissioner).”

§ 600. **Service of final process in new counties.**

In all cases where new counties have been or may hereafter be created, and executions, orders of sale upon foreclosure of mortgages, or other process affecting specific real estate, have been or may hereafter be adjudged by the final judgment or decree of a court of competent jurisdiction to be executed by the sheriff of the county in which such real estate was originally situated, such process may be executed by the sheriff of the new county in which such real estate is found to be situated, with the like effect as if he were the sheriff of the county designated in the judgment, decree, or order of sale, to execute the same. (*California. Stats. 1873-1874, p. 365.*)

CHAPTER XX.

FRAUDULENT TRANSFERS.

- § 601. Fraudulent transfers, generally.
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- § 604. Nature of the transfer required.
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- § 610. Property in hands of third party.
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- § 612. Transfer of lodging-house furniture.
- § 613. Transfer of undivided interest.
- § 614. Personal property on land conveyed.
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- § 616. Purchasers in good faith.

§ 601. **Fraudulent transfers, generally.** One of the most difficult obstacles encountered by officers in holding property belonging to the judgment debtor in executions arises from the facility with which transfers may be made of personal property. As if in contemplation of fraudulent intention on the part of vendors who are or are about to become insolvent the law has often hedged such sales around with strongly expressed provisions in favor of the creditor who is in pursuit of his claim. Not only are transfers declared to be void which are proven to be fraudulent, but the burden of proving fraud is in some cases by statute not only removed from the

creditor, but transfers under certain circumstances are to be conclusively presumed to be fraudulent. (*See sec. 602, post.*)

Where the presumption prevails to such extent an inquiry into the consideration paid or the good faith of the transaction is immaterial. (*Woods v. Bugbey*, 29 Cal. 467; *Brown v. O'Neal*, 95 Cal. 262, 29 Am. St. Rep. 111, 30 Pac. 538.)

§ 602. **Code provisions in California.** By the terms of section 3440 of the Civil Code:—

“Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer.”

All transfers of personal property founded in actual fraud are also declared to be void as against creditors. (*Civ. Code, sec. 3439.*)

In this state the statute stands upon the extremest rule of caution and promptitude. The statute makes certain facts conclusive evidence of fraud, and whatever may or may not be the actual intention of the

parties, if the actual facts exist which are contemplated by the law, the sale is void. The language of the statute is exceedingly strong, and the intention manifest. The change of possession from the vendor to the vendee must not only be actual but also continued. The object of the statute being the prevention of fraudulent sales of goods, no means more simple and efficient could have been adopted to have accomplished the end intended than that requiring this actual and continued change of possession. It takes away from the parties the means of carrying out their fraudulent intent and removes the temptation. As the fraudulent vendor cannot remain in possession under any pretense whatever he is compelled to trust entirely to the fidelity of the fraudulent vendee.

§ 603. **General principles—Leading cases.** There are numerous instances of record in which courts have been called upon to make a practical application of the principle that a vendee of personal property must assume at once all external *indicia* of title in order to protect himself against the creditors of the vendor. The leading case in California is that of *Stevens v. Irwin*, 15 Cal. 503, 76 Am. Dec. 500. In that case the court said:—

“The word ‘actual’ was designed to exclude the idea of a mere formal change of possession, and the word ‘continued’ to exclude the idea of a mere temporary change. But it never was the design of the statute to give such extension of meaning to this phrase, ‘continued change of possession,’ as to require that the vendor should *never* have any control over or use of them. This construction, if made

without exception, would lead to very unjust and very absurd results.

“The ‘continued change of possession,’ then, does not mean a continuance for all time of this possession, or a perpetual exclusion of all use or control of the property by the original vendor. A reasonable construction must be given to this language, in analogy to the doctrines of the courts holding the general principles transcribed into the statute. The delivery must be made of the property; the vendee must take the *actual* possession; that possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the claims of the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession must be continuous—not taken to be surrendered back again—not formal but substantial. But it need not necessarily continue indefinitely, when it is *bona fide* and openly taken, and is kept for such a length of time as to give general advertisement to the *status* of the property and the claims to it by the vendee.”

This case has been cited and quoted with approval in a long line of cases from *Ricketson v. Richardson*, 19 Cal. 334, to *Porter v. Bucher*, 98 Cal. 454, 33 Pac. 335. In *Godchaux v. Mulford*, 26 Cal. 323, 85 Am. Dec. 178 (*see, also, this section, post*), the court say that in *Stevens v. Irwin*, for the first time in this state, the true and rational exposition of the rule was given. (*See, also, sec. 604, post.*)

In *Godchaux v. Mulford*, 26 Cal. 316, 85 Am. Dec. 178, another leading case, the court said: “A hired clerk or salesman is no more in possession of

the goods of his employer than a hired laborer is in possession of the farm on which he is employed at work. The employment of the vendor in a subordinate capacity is colorable only and not conclusive upon the question as to whether there has been an immediate delivery and an actual change of the possession. He cannot be allowed to remain in the apparently sole and exclusive possession of the goods after the sale, for that would be inconsistent with such an open and notorious delivery and actual change as the statute exacts in order to exclude from the transaction the idea of fraud. But if it be apparent to all the world that he has ceased to be the owner, and another has acquired and openly occupied that position, that he has ceased to be the principal in the change and management of the concern, and become only a subordinate, or clerk, the reason of the rule announced in the statute is satisfied." This case has been cited on this point with approval in *Woods v. Bugbey*, 29 Cal. 472; *Goldstein v. Numan*, 66 Cal. 544, 6 Pac. 451; *Bell v. McClellan*, 67 Cal. 285; *Gould v. Huntley*, 73 Cal. 402, 15 Pac. 24, and in *O'Gara v. Lowry*, 5 Mont. 427, 5 Pac. 583 (1885), the above language was quoted with approval. (*See, also, sec. 608, post.*)

§ 604. **Nature of the transfer required.** The actual change of possession of personal property required by the statute is an open, visible change manifested by such outward signs as render it evident that the possession of the vendor has wholly ceased. "Then, if the possession of the property by the vendors had not wholly ceased when it was attached, it was liable to the attachments, notwithstanding, as

between the vendors and vendee, the sale was complete and the title to the property had become vested in the plaintiff as the purchaser." (*Cahoon v. Marshall*, 25 Cal. 201. *See, also, sec. 614, post.*) This case was also cited with approval in *Bell v. McClellan*, 67 Cal. 285, 7 Pac. 699; *Gould v. Huntley*, 73 Cal. 402, 15 Pac. 24; *Bunting v. Saltz*, 84 Cal. 171, 24 Pac. 167, and *Etchepare v. Aguirre*, 91 Cal. 295, 25 Am. St. Rep. 180, 27 Pac. 668. (*See, also, sec. 603, ante.*)

Under a statute requiring "an immediate delivery" of personal property sold, any delivery that is sufficient to pass the title as between the parties is sufficient. The further requirement of an "actual and continued change of possession" (*California. Code Civ. Proc., sec. 3440*) is intended to exclude mere formal and temporary change of possession, but not to require that the vendor should never have any control over it. (*Porter v. Bucher*, 98 Cal. 454, 33 Pac. 335.)

§ 605. **Change of possession a question of fact.** The question as to whether the sale of personal property is accompanied by an immediate delivery thereof and followed by an actual and continued change of possession is a question of fact for the jury. (*Meads, Seaman & Co. v. Lasar*, 92 Cal. 221, 28 Pac. 935.)

Every case of this kind "has its own particular features, and must be determined on the particular facts which surround the given transaction or transfer." (*Byrnes v. Moore*, 93 Cal. 393, 29 Pac. 70.)

§606. **Remedy of the creditor.** In case of an attempted transfer of personal property without such change of possession as is required by the statute any creditor of the vendor "may cause the property to be seized in the same manner as he might have done had there been no attempted transfer." (*Watson v. Rodgers*, 53 Cal. 401; *Brown v. O'Neal*, 95 Cal. 262, 29 Am. St. Rep. 111, 30 Pac. 538.)

§ 607. **Resumption of possession.** In case of a transfer of a mare and a header by father to son the court quoted from 13 Vermont, 284, with approval as follows: "After a sale of personal chattels has become perfected by such a visible, notorious and continued change of possession that the creditors of the vendor may be presumed to have notice of it, the vendee may lend, or let, or employ the vendor to sell, or perform any other service about the thing, with the same safety he may a stranger." (*Gould v. Huntley*, 73 Cal. 402, 15 Pac. 24. See, also, sec. 603, ante.)

§ 608. **Subsequent employment of vendor.** The employment of the vendor by the vendee after the sale is not conclusive evidence of fraud, but is an element of such proof. (*Godchaux v. Mulford*, 26 Cal. 316, 85 Am. Dec. 178. See, also, sec. 603, ante.)

In the case of *Weil v. Paul*, 22 Cal. 493, one Strauss, a clothing merchant whose goods were under attachment, sold them to Weil, who procured the release of the attachment and removed the stock to his (Weil's) cigar store. Within less than two weeks thereafter Strauss was engaged professedly as employee of Weil in peddling out the goods and managing their sale at retail, in which condition they

were again attached as the property of Strauss: *Held*, that there was no such actual and continued change of possession as was required by the fifteenth section of the statute of frauds, and that the goods were therefore liable to the attachment.

§ 609. **Sale of property in vendee's possession.**

In case of a sale of horses already in the possession of the vendee, followed by an immediate removal to another ranch owned by him, the court held that "the delivery and possession were as complete as the nature of the case permitted." (*Hogan v. Cowell*, 73 Cal. 211, 14 Pac. 780.)

§ 610. **Property in hands of third party.** If a vendor of goods in the care and keeping of a third person directs him to deliver them to the vendee, and the party holding the goods consents to retain the goods for him and does so retain them, it is sufficient delivery and change of possession to satisfy the requirements of the statute. (*Williams v. Lerch*, 56 Cal. 330.)

§ 611. **Transfer of cumbrous personal property.** What acts will amount to an immediate and an actual and continued change of possession of personal property of a cumbrous and ponderous nature must depend in a great degree upon the circumstances of the particular case; but care should be taken in such cases to keep in view the object of the statute, and to exact nothing less than a substantial observance of its salutary provisions.

The purchaser or mortgagee of a kiln of bricks, while being burned, must take that possession of the

property which places him in the relation to the same that owners usually have to a like kind of property, in order to secure it against attaching creditors of the vendor. If the owner of the kiln, before the burning of the same has been completed, makes a sale thereof in good faith and for a valid consideration to a creditor, and the vendor completes the burning of the kiln, exercising the same apparent control as before, the sale is to be deemed fraudulent as to an attaching creditor for want of a change of possession. (*Woods v. Bugbey*, 29 Cal. 466; cited with approval in *Hilliker v. Kuhn*, 71 Cal. 221, 16 Pac. 707.)

§ 612. **Transfer of lodging-house furniture.** A lodging-house keeper sold all the furniture for a full consideration to a person who assumed immediate possession; the vendor notified the lodgers at once, but did not leave the house for five days, owing to sickness; the transfer was held good as against a writ against the vendor, levied just after she left the house. (*Ross v. Sedgwick*, 69 Cal. 247, 10 Pac. 400.)

§ 613. **Transfer of undivided interest.** In a case involving the sale of an undivided interest in a horse it was held that where one co-owner of personal property, who is in sole possession, sells his interest to a third party, there must be an immediate delivery; but that the other co-owner might sell his interest without the necessity of a change of possession. (*Brown v. O'Neal*, 95 Cal. 262, 29 Am. St. Rep. 111, 30 Pac. 538.)

§ 614. **Personal property on land conveyed.** In *Bunting v. Saltz*, 84 Cal. 168, 24 Pac. 167, a case

involving the transfer of personal property located upon land the title to which was also attempted to be transferred, the following instruction to the jury was held to be proper:—

“The possession which the law requires the vendee to have, after a transfer to him of personal property, is not sufficient if it amounts simply to constructive possession, or the mere possession which the law attaches to the ownership of the land. Therefore, if the personal property so sold is located on land to which the vendee obtains a title then or thereafter, the mere transfer of ownership to the land is not sufficient to constitute a change of possession of the personal property sold. The possession of the personal property must be in some way so changed as to indicate by the change that the former owner no longer owns it.”

In the same case the court quotes with approval from *Cahoon v. Marshall*, 25 Cal. 197, as follows: “The possession by the plaintiff of the farm upon which the personal property was when it was purchased by her, provided it was an actual and exclusive possession, would be strong evidence of the like possession of such personal property. . . . If the actual and exclusive possession of the farm would be strong evidence of his like possession of the personal property, then the possession of the farm by the vendor, or the concurrent possession of it by the vendor and vendee, would at least tend very strongly to show that the plaintiff had not that actual possession of the personal property necessary to place it beyond the reach of the creditors of the vendor.”

§ 615. **Cattle, hogs, etc., on a ranch.** In a case involving the transfer of an undivided interest in a band of cattle on an extensive range, certain acts of the vendee—riding over the range and looking after them—were held sufficient to justify the verdict of a jury holding the transfer to be valid. (*Hart v. Mead*, 84 Cal. 244, 24 Pac. 118.)

A sale of hogs allowed to remain upon a ranch in charge of the same persons as before the sale does not satisfy the California statute, although such persons were requested to take charge for the buyer and consented to do so. (*Mosgrove v. Harris*, 94 Cal. 162, 29 Pac. 490.)

§ 616. **Purchasers in good faith.** “The purchaser or encumbrancer in good faith,” who is protected by the statute against fraudulent transfers, must be one who not only acquired without notice of the infirmity of his vendor’s title, but must have parted with value. (*Brown v. Bank of Napa*, 77 Cal. 544, 20 Pac. 71.)

CHAPTER XXI.

FIXTURES.

- § 617. Fixtures, generally.
- § 618. California code definitions.
- § 619. General rule in California.
- § 620. Intention to govern, generally.
- § 621. Limitation of the rule.
- § 622. Engines, boilers, and machinery.
- § 623. Buildings—Question of fact.
- § 624. Building—When removable.
- § 625. Omission in lease no estoppel.
- § 626. Renewal of lease.
- § 627. Mortgagee of lessee.
- § 628. Fixtures on public lands.
- § 629. When fixtures become personal property.
- § 630. How to levy upon fixtures on realty.
- § 631. Leading case quoted.

§ 617. **Fixtures, generally.** The question often arises as to whether property is in contemplation of law “personal” in nature, or whether it has become part of the realty upon which it has been placed. Upon the determination of this question will depend not only the legal *status* of such property, as “real” or “personal,” but its ownership; and both these points become material in the consideration of it as the subject of legal process. The question as to when property primarily personal becomes a part of the realty and cannot be removed arises in two widely different classes of cases,—i. e. between vendor and vendee as to the right of the former to retain, and between owner and lessee as to the right of the latter to remove such property from the realty.

Upon few subjects have there been more numerous or more diverse decisions by the courts. Though no great difficulty appears at first sight in the definition itself, yet the application to particular facts has vexed the courts and given rise to an endless conflict of decisions. Kent defines a fixture to be "an article of a personal nature affixed to the freehold." It has been held that by the expression "annexed to the freehold" is meant fastened to or connected with it; mere juxtaposition, or the laying of an object, however heavy, on the freehold, does not amount to annexation.

The author of "Smith's Leading Cases" says: "The general rule appears to be that, where the instrument or utensil is an accessory to anything of a personal nature, as to the carrying on a trade, it is considered a chattel; but where it is a necessary accessory to the enjoyment of the inheritance it is to be considered as a part of the inheritance." Again: "The general rule governing this subject is that the tenant, if he have annexed anything to the freehold during his term, cannot again remove it without the consent of his landlord."

As between the landlord, who is the owner of the freehold, and the tenant the general rule is that during his term the tenant may remove fixtures erected or placed by himself, things erected for the personal convenience of the tenant, which are personal in their nature, such as a cider mill, to be used during tenancy. But if he suffers them to remain fixed after his tenancy expires, and he quits the possession of the land, he cannot enter to remove them.

The rule as to fixtures is construed most strongly in favor of the vendee in case of a sale, and in favor

of the tenant in case of a lease. "The general rule of law is that whatever is once annexed to the freehold becomes parcel thereof, and passes with the conveyance of the estate. Though the rule has been in modern times greatly relaxed, as between landlord and tenant, in relation to the things affixed for the purposes of trade and manufacture, and also in relation to articles put up for ornament or domestic use, it remains in full force as between vendor and vendee. As a general thing, a tenant may remove what he has added, when he can do so without injury to the estate, unless it has become, by its manner of addition, an integral part of the original premises; but as against a vendor, all fixtures pass to his vendee, even though erected for the purposes of trade and manufacture, unless specially reserved in the conveyance." (*Field, J., in Sands v. Pfeiffer*, 10 Cal. 258.)

§ 618. **California code definitions.** In that portion of the Civil Code of California relating to the "Nature of Property" (*div. 2, pt. I, tit. 1*) it is provided that real property consists not only of land, but that which is either affixed to, incidental or appurtenant to land or immovable by law (*sec. 658*), and that "a thing is deemed to be affixed to land when it is attached to it by roots as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts or screws." (*Sec. 660.*) Fixtures attached to mines are declared by section 661 of the Civil Code to be: "Sluice-boxes, flumes, hose, pipes,

railway tracks, cars, blacksmith shops, mills, and all other machinery or tools used in working or developing a mine."

§ 619. **General rule in California.** Whatever the owner of real property has annexed to it for the more convenient use and improvement of the premises passes by his deed, but whatever chattels a tenant has annexed to or placed upon the land for the purposes of trade, manufacture, agriculture and domestic convenience may be removed by him, with an exception in case it cannot be removed without practically destroying it, or where it has become essential to that to which it has been attached. (*Fratt v. Whittier*, 58 Cal. 130, 131, 41 Am. Rep. 251; *Hendy v. Dinkerhoff*, 57 Cal. 6, 40 Am. Rep. 107.)

§ 620. **Intention to govern, generally.** In order to determine whether a thing is a fixture or not we must look at the manner in which it is annexed, the intention of the person who made the annexation, and the purpose for which the premises are used. (*Lavenson v. Standard Soap Co.*, 80 Cal. 250, 13 Am. St. Rep. 147, 22 Pac. 184; 2 Kent, 13th ed. 343.)

§ 621. **Limitation of the rule.** While the intention of the annexation will govern, as a general rule, this must be limited where the subject or mode of annexation is such that the attributes of personal property cannot be predicated of the thing in controversy, and it has become so absorbed or merged into the realty that its identity as personal property is lost, as when the property could not be removed without practically destroying it, or where it or part

of it is essential to the support of that to which it is attached. (*Hendy v. Dinkerhoff*, 57 Cal. 6, 40 Am. Rep. 107.)

§ 622. **Engines, boilers, and machinery.** The rule in reference to fixtures is applied with different degrees of strictness as between different parties. Engines, boilers, machinery, and the like, which could properly be removed by the tenant, as between him and his landlord, might, if placed there by the owner of the land, be considered a part of the realty and pass by the conveyance of the same, as between vendor and vendee. (*McGreary v. Osborne*, 9 Cal. 119; *Fratt v. Whittier*, 58 Cal. 130, 41 Am. Rep. 251.) An engine resting upon and fastened by bolts and nuts to timbers which are imbedded in the soil is a part of the realty so as to pass by deed of the same; also a steam boiler secured by trestlework imbedded in the soil and resting on and surrounded by mason work of stone and mortar built on the ground. (*McKiernan v. Hesse*, 51 Cal. 594.) In the same case it was held that such property passed, although placed by third parties upon the land while owned by the United States.

"The engines and boilers, etc., used in a flour-mill, being permanently fastened to the mill, which had its foundation in the ground: *Held*, to be fixtures covered by a mortgage upon the premises, though put up after the execution of the mortgage, and held to pass to the purchaser of the mortgaged premises under a decree of foreclosure." (*Field, J., in Sands v. Pfeiffer*, 10 Cal. 258.)

A tenant who puts up machinery for a mill in a house leased and fastens it by bolts, screws, etc., to

the house has the right to remove it; but, as between vendor and vendee, such machinery would be considered as a part of the realty. (*McGreary v. Osborne*, 9 Cal. 119.)

A steam engine and boiler fastened to a frame of timber bedded in the ground of a quartz ledge sufficient to make it level, with a roof or shed to protect the machinery, and used for the purpose of working the ledge, are so annexed to the freehold as to become a fixture. Such machinery, when applied to quartz leads, is a *trade fixture*, removable by the tenant, if otherwise entitled to remove it. But this removal can only be during the tenancy and during such further period of possession by the tenant as he holds *the premises under a right to still consider himself a tenant*, and not during the time he may actually hold possession after his lease has expired. Such machinery so fixed is included by the phrase in the lease, "improvements that may be put up on the ground for working the lead." And where the lease stipulated that the improvements shall go to the lessor on the termination of the lease, if the rent was not paid, or if the lessee declined to purchase, as per the lease he might, the lessor's right to the fixtures is not destroyed by the tenant contracting subsequently to buy and taking a bond for title on payment of the purchase money, but failing to fulfill his bond. (*Merritt v. Judd*, 14 Cal. 60.)

An engine, boiler, and machinery for a flouring mill, erected by a lessee on the demised premises, and securely attached thereto by bolts and screws, are fixtures as between him and his attaching creditors, notwithstanding an agreement between the lessor and lessee that the latter should be at liberty

to remove the machinery upon the expiration of the lease. The severance and removal of the fixtures by the lessee converts them into personalty. (*McNally v. Connolly*, 70 Cal. 3, 11 Pac. 320.)

§ 623. **Buildings—Question of fact.** A “building,” without other qualification or term of description, is essentially personal property, and the mere erection of it upon land does not necessarily make it a fixture. The question is one of fact, to be determined upon the evidence in each particular case. (*Miller v. Waddingham*, 91 Cal. 377, 27 Pac. 750, 13 L. R. A. 680; *Dietz v. Mission Transfer Co.*, 95 Cal. 92, 30 Pac. 380.) A building set upon blocks resting on the ground is personal property, and replevin lies to recover it. (*Pennybecker v. McDougal*, 48 Cal. 160.)

D purchased a lot of land at sheriff’s sale on execution and entered into possession and erected certain buildings thereon. On the twenty-fifth day of May, 1858, D removed the buildings. On the same day the buildings were removed the defendants in execution sold the premises to T, and a day or two after T redeemed the lot from the sale and then brought suit against D to recover the value of the buildings: *Held*, that, as there was no evidence that the buildings were attached to the soil, T cannot recover. (*Tyler v. Decker*, 10 Cal. 436.)

In the absence of any agreement to the contrary, a dwelling-house and barn erected upon land of his landlord by a tenant become a part of the realty. A lessee, before the expiration of his term, erected a house and barn on the leased premises. At the expiration of the term a new lease was taken of the

premises without reserving the rights of the lessee to the buildings so erected: *Held*, that the buildings become fixtures annexed to the land, and that the lessee had no right to remove them. (*Marks v. Ryan*, 63 Cal. 107.)

§ 624. **Building—When removable.** A building erected on leased ground for a lumber office and sleeping-place for employees in a lumber yard, and which rests upon short posts on top of sills laid upon the ground, constitutes trade fixtures, removable by the tenant. (*Security L. and T. Co. v. Willamette S. M. L. and M. Co.*, 99 Cal. 636, 34 Pac. 321.)

§ 625. **Omission in lease no estoppel.** “A party who has placed improvements and fixtures upon land which he has leased upon condition that he should have the right to remove them, cannot be estopped from taking them away, even though he may have inadvertently signed a lease with no such conditions therein. In the case of *Isenhoot v. Chamberlain*, plaintiff and defendant entered into an agreement for the lease of land upon certain conditions named in the lease, and the further condition that, on or before the expiration of the lease, defendant should have the right to remove from the land certain fixtures and improvements previously placed there by him. During negotiations for the lease, plaintiff at all times admitted that defendant was the owner of the improvements and fixtures, and entitled to remove them, and that the right of removal should be a condition of the lease. The lease was reduced to writing by the procurement of the plaintiff (lessor), and when read to defendant (lessee) he refused to

sign the same unless such condition was added to the lease. But, upon being informed by the plaintiff that he (plaintiff) knew the fixtures and improvements belonged to defendant, and that the omission of the conditions from the lease would make no difference, and that defendant should have the right of removal, the defendant accepted the assurance of plaintiff, and, relying thereon, and believing in the good-faith of plaintiff, was induced to, and did, execute the lease, omitting the condition: *Held*, plaintiff was estopped from claiming the improvements and fixtures, and that defendant, having commenced to remove the same previous to the expiration of the lease, would not be restrained by injunction; and that defendant was entitled to have the lease reformed." (*Isenhoot v. Chamberlain*, 59 Cal. 630.)

§ 626. **Renewal of lease.** When a lessee has placed upon land improvements which would pass as between vendor and vendee his right to remove them is terminated by taking a new lease without reserving his right to the improvements. (*Merritt v. Judd*, 14 Cal. 60; *Mark v. Ryan*, 63 Cal. 107.)

§ 627. **Mortgagee of lessee.** Although a lessor of land cannot in a given case claim the fixtures, it is otherwise of the mortgagee of the lessee. Here the question is between grantor and grantee, and the latter holds all fixtures, whether for trade or manufacture, agriculture, or habitation. (*Merritt v. Judd*, 14 Cal. 60.)

§ 628. **Fixtures on public lands.** A fixture is an article of a personal nature annexed to the freehold,

and may exist on public land. Although placed there by third parties, it passes to the purchaser who acquires title from the government. (*Merritt v. Judd*, 14 Cal. 60; *McKiernan v. Hesse*, 51 Cal. 594.)

§ 629. **When fixtures become personal property.** By the wrongful severance from the premises the fixtures become personal property, for the recovery of which an action of replevin will lie by the purchaser after he obtains the sheriff's deed. (*Sands v. Pfeiffer*, 10 Cal. 259; *McNally v. Connolly*, 70 Cal. 6, 11 Pac. 320.)

§ 630. **How to levy upon fixtures on realty.** Where the attachment or execution is to be levied upon steam boilers, engines, pumps, or other articles that have been attached to the realty so as to become a part thereof, the levy should be made as upon realty. It is the interest of the defendant in the land which is to be attached. And where such fixtures are from their nature or exposed condition liable to clandestine removal or injury through malice or otherwise, the officer will be justified by consent of the plaintiff in putting a keeper in charge thereof to take care of the property so that he may have it intact at the time of sale. If the plaintiff decline to incur the expense of a keeper he cannot complain of laxity on the part of the officer if the property is lost or injured through lack of care on his part.

§ 631. **Leading case quoted.** The leading case in California upon this subject is that of *Fratt v. Whittier*, cited (*sec. 619, ante*); and as the court in its opinion discussed the question with great thor-

oughness, both as affecting vendor and vendee and also landlord and tenant, a large portion of the decision is here given.

“This is an action to recover certain gas fixtures, consisting of chandeliers, globes, brackets, burners, pendants, etc., a kitchen range with boiler attached, a patent water-filter, tanks and window-screens. The property was attached to a building known as the Orleans Hotel, situate on a lot of land fronting on Second Street, in the city of Sacramento. As owner of the hotel, the plaintiff, on October 15, 1879, contracted in writing to sell the same to the defendant, by the following description, viz.: ‘Lot No. 6, in the square between J and K and Front and Second streets, in the city of Sacramento, and the appurtenances and improvements thereunto belonging.’

“The sale was made for twenty-eight thousand dollars, gold coin, payable after an examination and approval of the title, upon receiving from the plaintiff possession of the property and of a deed of grant of the same, on or before the 1st of November, 1879, reserving to the plaintiff, among other things, the right within ten days after delivery of possession, to remove from the upper rooms of the hotel his ‘furniture, carpets, and pictures, but none of the permanent fixtures or appurtenances to said property shall be removed.’ On the 25th of October the defendants, having satisfied themselves about the plaintiff’s title, paid the full amount of the purchase money and received from the plaintiff possession and a deed of grant of the property. The deed described the property the same way that it had been described in the contract of sale, and it also contained the recital that the deed had been made in pursuance of the contract

of sale and subject to the terms, conditions and reservations therein contained. Within ten days after the delivery of possession, plaintiff demanded of the defendants the privilege of removing the articles in controversy from the hotel, which being refused, this action was instituted, and the question arises whether the articles are personalty, or fixtures which passed as appurtenances of the realty by deed of grant.

“If the question arose out of the deed alone, it might not be difficult of solution, for the weight of authority seems to be in favor of the proposition that they are to be regarded as movable property, capable of being severed from the building; yet the authorities upon the subject are conflicting. . . .

“What is accessory to real estate is, according to the rule of common law, part of it, and passes with it by alienation. That rule has been, in the growth of the law, greatly modified as between landlord and tenant, for the encouragement of trade, manufacture, agriculture and domestic convenience; and courts recognize and enforce the right of removal by a tenant, of chattels annexed to the freehold for such purposes. But the rule which is applicable to persons in that relation does not apply as between heir and executor, vendor and vendee. As between the latter, the rule of the common law is still applicable, except so far as it may be modified by statutory regulations on the subject; so that chattels attached to the freehold by the owner, contributing to its value and enjoyment, pass by the grant of the freehold, if the grantor had power to convey. (*Tourtellot v. Phelps*, 4 *Gray*, 378.) And after conveyance, they cannot be severed by the vendor or any one else than the owner.

“As between vendor and vendee, therefore, the rule for determining what is a fixture is always construed strongly against the seller. Many things pass by a deed of a house, being put there by the owner and seller, which a tenant who had put them there might have removed, and they will be regarded as fixtures, which pass to the vendee, although annexed and used for purposes of trade, manufacture, or for ornament or domestic use. Thus, potash kettles, appertaining to a building for manufacturing ashes (*Miller v. Plumb*, 6 Cow. 665, 16 Am. Dec. 456); a cotton gin fixed in its place (*Bratton v. Claussen*, 2 Strob. 478); a steam engine to drive a bark-mill (*Oves v. Oglesby*, 7 Watts, 106); kettles set in brick in dyeing and print-works (*Dispatch Line v. Bellanney Man. Co.*, 12 N. H. 207, 37 Am. Dec. 203); iron stoves fixed to the brick-work of chimneys (*Goddard v. Chase*, 7 Mass. 432); wainscot work, fixed and dormant tables, engines and boilers used in a flour-mill attached to it (*Sands v. Pfeiffer*, 10 Cal. 259); a steam engine and boiler fastened to a frame of timber and bedded in a quartz ledge and used for the purpose of working the ledge (*Merritt v. Judd*, 14 Cal. 50); a conduit or water pipe to conduct water to a house (*Philbrick v. Ewing*, 97 Mass. 134); hay poles in use on a hop farm (*Bishop v. Bishop*, 11 N. Y. 123, 62 Am. Dec. 68); statues erected for ornament, though only kept in place by their own weight (*Snedeker v. Warring*, 12 N. Y. 170.) In fact, whatever the vendor has annexed to a building for the more convenient use and improvement of the premises passes by his deed. The true rule deduced from all the authorities, says the supreme court of Virginia, seems to be this, that, when

the machinery is permanent in its character and essential to the purpose for which the building is occupied, it must be regarded as realty, and passes with the building; and that whatever is essential for the purpose for which the building is used, will be considered as a fixture, although the connection between them may be such that it may be severed without physical or lasting injury to either. (*Green v. Phillips*, 26 *Gratt.* 752, 21 *Am. Rep.* 353; *Skelton v. Ficklin*, 32 *Id.* 727.)

“Judged by these rules it would seem as if there was no room for doubt as to the character of the articles in controversy. Taking into consideration their nature, the circumstances under which they were placed in the building, the mode of their connection with it, and the relation which they bear to its use and enjoyment, they must be regarded as essential for the purposes for which the building was used. The plaintiff himself by his testimony shows that the globes were lettered ‘Orleans Hotel,’ and that they, with the chandeliers, etc., were necessary for furnishing light to the building; that the range rested on a foundation of brick, and that it and its attachments were annexed to the building by pipes, which connected them with the tanks and filters on the roof of the building, and by a waste-pipe which ran through the wall of the building, and connected with a sewer in the alley outside, and the range and its attachments were necessary for cooking; that the tanks and filters were attached to the building by a system of pipes which connected them with the main, or pipes of the City Water Company, and with various parts of the hotel, and were necessary to supply the hotel with clear water; that the mosquito

transoms and window-screens were fitted to the windows and transoms of the hotel—each window and transom frame being fitted to its particular window, and shoved up and down in it on grooves, and all of them were necessary to the hotel, as its windows, its blinds and shutters. All of the articles were, therefore, essential to the use and enjoyment of the hotel; in fact, as the plaintiff testified, ‘it would not have been a hotel without them.’ They were, therefore, fixtures which passed by the deed of grant to the defendants, unless they were specially reserved by the deed. But the deed reserved none of the articles. It was made, according to its recitals, in pursuance of the agreement of the 15th of October, and subject to the terms, conditions and reservation therein contained and expressed.

“As already stated, the agreement reserved only the furniture, pictures and carpets of the upper rooms of the building, and none of the ‘permanent fixtures or appurtenances to the property.’ In the absence from the deed of any special reservation of the articles, it must be presumed that the parties, by their agreement, considered them as permanent fixtures and appurtenances of the hotel, which were to pass by the deed; it is a well-settled rule of law that parties themselves may, by express agreement, fix upon chattels annexed to realty whatever character they may have agreed upon. Property which the law regards as fixtures may be by them considered as personalty, and that which is considered in law as personalty they may regard as a fixture. Whatever may be their agreement, courts will enforce it. (*Smith v. Waggoner*, 50 Wis. 155, 6 N. W. 568; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Ford v.*

Cobb, 20 N. Y. 344; *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537; *Ford v. Williams*, 24 N. Y. 359; *Smith v. Benson*, 1 Hill, 176; *Menagh v. Whitwell*, 52 N. Y. 146, 11 Am. Rep. 683.)

“So the plaintiff, when he contracted to sell the hotel property with its appurtenances and improvements, reserving from the sale only the carpets, furniture and pictures of the upper rooms of the building, fixed upon all the chattels which he had annexed to the hotel, and which were necessary to its use and enjoyment, the character of appurtenances and improvements of the hotel. None of them by any possibility of construction could fall within the reservation of ‘furniture, carpets, or fixtures in the upper rooms of the hotel.’ The plaintiff, therefore, sold the articles in question as fixtures with the hotel, and as such they passed by his subsequent deed of the premises to the defendants.” (*Fratt v. Whittier*, 58 Cal. 126, 41 Am. Rep. 251.)

CHAPTER XXII.

SUITS AGAINST SHERIFFS.

- § 632. Limitation of actions against officers.
- § 633. Same limitations as to sureties.
- § 634. When statute commences to run.
- § 635. Illegal levy.
- § 636. When previous demand not necessary.
- § 637. When demand necessary.
- § 638. Justification for seizure.
- § 639. Duress of goods.
- § 640. Liability of officer and sureties for trespass.
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- § 655. Plaintiff bound by his bond.
- § 656. Judgment against sheriff.
- § 657. An estoppel that protects the sheriff.
- § 658. Indemnity bond—Jurisdiction of courts.
- § 659. Penalty for not paying over moneys.
- § 660. Remedy by motion.
- § 661. Liability for acts of deputy.
- § 662. Officer not responsible through laches of another.
- § 663. Release of sheriff by stipulation.
- § 664. Offices of sheriff and tax-collector separate.
- § 665. Principal and deputy—Levy of separate writs.

§ 632. **Limitation of actions against officers.** Under the practice in California an action cannot be commenced after two years against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official capacity and in virtue of his office or by the omission of an official duty, including the non-payment of money collected upon an execution. (*Code Civ. Proc.*, sec. 339.) An action cannot be commenced after the lapse of one year against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process. (*Code Civ. Proc.*, sec. 340.) An action cannot be maintained, unless commenced within six months, against an officer or officer *de facto* to recover any goods, wares, merchandise, or other property seized by any such officer in his official capacity as tax-collector, or to recover the price or value of any goods, wares, merchandise, or other personal property so seized, or for damages for the seizure, detention, sale of, or injury to any goods, wares, merchandise, or other personal property seized, or for damages done to any person or property in making any such seizure. (*Code Civ. Proc.*, sec. 341.)

§ 633. **Same limitations as to sureties.** It is also held that it was not the intention to allow a longer period for commencing an action against a sheriff and his sureties "for a liability incurred by doing an act in his official capacity," than is allowed for commencing an action against him alone for it. (*Paige v. Carroll*, 61 Cal. 211.)

§ 634. **When statute commences to run.** In an action brought against a public officer for money al-

leged to have been received by him in his official capacity, but for which he failed to account, the statute of limitations commences upon the default of the officer to pay over the money according to law, and not from the time of the demand made for it. (*People ex rel. Dunn v. Melone*, 73 Cal. 574, 15 Pac. 294.)

The statute of limitations for breach of an official bond does not commence running until the expiration of the official term. (*People v. Van Ness*, 79 Cal. 84, 12 Am. St. Rep. 134, 21 Pac. 554.)

When a sheriff is *ex officio* tax-collector the statute prescribing limitation of actions against a sheriff does not apply to an action upon his bond as tax-collector. (*People v. Burkhardt*, 76 Cal. 606, 18 Pac. 776.)

The supreme court of Colorado (*In re People to Use of Fritch v. Cramer et al.*, 15 Colo. 155, 25 Pac. 302) decides that the liability of sheriffs for the omission of any official duty, except for escapes, accrues when the alleged consequential injury was suffered, and not when the alleged non-feasance occurred.

§ 635. **Illegal levy.** If the sheriff levies upon the property of a person not a party to the execution he is responsible in an action at law. He has become a trespasser as against the rights of the owner of the property. The statute allows him to try the rights of property or the protection of an indemnity bond. The procedure in such cases has been pointed out elsewhere in this volume. If he cannot safely hold the property, he is entitled to indemnity from the plaintiff. If the sheriff take property not belonging

to the defendant in the writ, whether in his possession or not, the taking is tortious.

§ 636. **When previous demand not necessary.** If the original possession of property is acquired by a tort no demand previous to the institution of a suit is necessary. (*Sargent v. Sturm*, 23 Cal. 359, 83 Am. Dec. 118, affirmed in *Wellman v. English*, 38 Cal. 584. See, also, *Boulware v. Craddock*, 30 Cal. 190, which overrules all cases subsequent to and in conflict with *Ledley v. Hays*, 1 Cal. 160, on this point.) In the case of *Paige v. O'Neal*, 12 Cal. 483, the court say:—

“It was not essential to aver a demand of the defendant of the wheat in controversy in the complaint, or to prove a demand on the trial. If the property in fact belonged to the plaintiff—and it is upon this theory that the suit is brought, and to this effect the evidence tended when the plaintiff rested—the seizure by the defendant was tortious; and it is a general rule that where the possession of property is originally acquired by a tort, no demand previous to the institution of a suit for its recovery is necessary. It is only when the original possession is lawful, and the action relies upon the unlawful detention, that a demand is required.”

In the case of *Woodworth v. Knowlton*, 22 Cal. 169, the court say: “The evidence and pleadings show clearly that the plaintiff was the owner of the property, and in possession at the time of the levy of the attachment, and we see nothing in the evidence showing a right of possession in any person other than the plaintiff at the time of the commencement of the suit. The attachment gave the defend-

ant no authority to take the property owned by the plaintiff, and his seizure of the property was therefore wrongful and unlawful. If any demand whatever was necessary in this case, which is not very clear, it was sufficient to make that demand of the party in actual possession, and who was able to comply with it, and it would have been but an idle ceremony to make the demand of Atherton or Griffin, who could not have complied with it had they been willing to do so."

If a sheriff, by virtue of an execution, seizes the property of a person other than the judgment debtor, whether by mistake or design, it is not necessary for the owner of the property thus seized to make a demand on the sheriff before commencing suit. (*Boulware v. Craddock*, 30 Cal. 190.) The sheriff, having misapplied his process, stands in the position of every other trespasser, and is liable to an action the instant the trespass is committed. The circumstance that the property may have been in the possession of the execution debtor at the date of the seizure amounts to nothing except upon proof of fraud or commixture. In the case above cited the court say: "The rule of the common law is correctly stated in *Ledley v. Hays*, 1 Cal. 160, and the correctness of that decision is impliedly recognized in *Daumiel v. Gorham*, 6 Cal. 44. The statement of facts in *Taylor v. Seymour*, 6 Cal. 512, is imperfect; but if that case is to be understood as laying down a different rule, then we prefer to follow *Ledley v. Hays*."

§ 637. **When demand necessary.** In the case of *Kelley v. Scannell*, 12 Cal. 73, the supreme court held that notice of claim and demand for the property

was necessary on the part of the claimant. This was an action to recover the possession or the value of certain personal property, comprising the furniture, fixtures and stock of the "Empire State Saloon." The property was, on the 19th of February, 1857, seized by defendant as sheriff of San Francisco County, under an attachment against one Wilson. Prior to the seizure of the property by the defendant, the plaintiff by an instrument in writing bargained and sold the property to Wilson, and by the terms of the agreement the property was to be delivered and paid for on the 14th of February, 1857. On that day Wilson paid a part of the purchase money and the time for the payment of the balance was extended to February 24th. On the 14th of February Wilson and one Kirk were in possession of the property and appear to have been the proprietors of the saloon. This possession continued up to the time of the seizure of the property by the defendant as sheriff. The plaintiff's complaint contains no allegation, nor was there any proof on his part of notice of his claim or demand of the property prior to the bringing of this action. Plaintiff had judgment in the fourth district court, and the supreme court granted a new trial, holding that "defendant having seized the property by virtue of his office and process, while in the possession of the party defendant mentioned in the writ, was entitled to notice and demand from plaintiff before he can be held liable to an action for the possession or value."

Where, at the time of the levy of a second execution (the first having been quashed), the goods first levied upon had passed by sale to a third party, and were mixed with other goods subsequently purchased, which last goods were alleged to be liable to

the execution, it was held in the case of *Wellington v. Sedgwick*, 12 Cal. 470, that if they were so mixed or confounded with other goods as that they could not be identified or distinguished, and Wellington failed to point out to the sheriff or designate the goods which were not subject to execution, the sheriff could not be liable for levying on the whole. But the sheriff would be bound after the levy on notice to him of the goods not liable, to restore them; but this notice must be specific, apprising him of and designating the particular goods improperly seized, and must be given previously to suit brought.

§ 638. **Justification for seizure.** An officer, in order to justify the seizure of property in the possession of a stranger to the writ which he has executed, must plead specially such justification. He cannot justify under a general denial of the allegations of the complaint.

The general denial only puts in issue the allegations of the complaint. New matter must be specially pleaded, and new matter is that which the defendant must affirmatively establish. (*Glazer v. Clift*, 10 Cal. 304.)

Where, in an action against the sheriff for taking goods he justifies under an attachment against a third person, it is not necessary that his answer should set forth minutely every fact relating to the attachment suit. An answer which stated the time of commencement of the action, the names of parties, the court, and that the goods were taken by virtue of a writ of attachment issued therein, held to be sufficient. (*Towdy v. Ellis*, 22 Cal. 651.)

When property is taken from the possession of the defendant by the officer levying thereon, it is sufficient to introduce (in suit against the sheriff) in evidence the attachment or execution under which the levy is made; but when found in the possession of a stranger claiming title to the property so seized, it is likewise necessary to show a judgment or prove the debt for which judgment is demanded in the attachment suit. (*Sexey v. Adkinson*, 34 Cal. 346, 91 Am. Dec. 698.)

If an officer seizes the property of the debtor, and the writ be regular on its face, it is a sufficient justification to him; for the defendant may, if the attachment has been improvidently issued, move to have it quashed or bring a suit upon the undertaking; but a third party, a stranger to the record, could not interfere, and therefore it would seem but justice, before any right could be established against him by reason of a proceeding to which he was not a party, that its regularity should be shown. An officer who seizes property in the hands of the debtor may justify under the execution or process; but when he takes property from a third person, who claims to be the owner thereof, he must show the judgment and execution; if an attachment, the writ of attachment and the proceedings on which it was based.

In the case of *Norcross v. Nunan*, Sheriff, 61 Cal. 640, which was an action for the recovery of personal property or its value, and for damages for its detention, the court below refused to admit the writ of attachment in evidence. On appeal Mr. Justice Myrick delivered the following opinion of the court:—

"This was an action for the recovery of personal property or its value, and for damages for its detention. But the plaintiff did not claim the delivery of the property to him before judgment. The defendant, sheriff, justified under a writ of attachment and an execution.

"1. Conceding that the court below was correct in refusing to admit the writ of attachment in evidence because of the defect of the affidavit, in stating that the amount claimed was due upon either an express or implied contract, yet the defendant was entitled to have the execution in evidence upon which to base the defense that the transfer of the property from Gordon & Cory to plaintiff was fraudulent and void as to creditors. We think the evidence of the plaintiff clearly shows that the transfer was void as to creditors. (*Civ. Code, sec. 3440.*) The sheriff did not take the property from the possession of plaintiff; and even if there were irregularities in the proceedings for the judgment, such irregularities would not prevent the officer from justifying under an execution valid on its face. There is nothing on the face of the execution to show its invalidity. The rule is fully stated in Freeman on Executions, section 101.

" "The sheriff may limit his inquiries to an inspection of the writ. If the writ is issued by the proper officer, in due form, and appears to proceed from a court competent to exercise jurisdiction over the subject-matter of the suit, to grant the relief granted and enforce it by the writ issued, and there is nothing on the face of the writ showing a want of jurisdiction over the person of the defendant, or showing the writ to be clearly illegal from some other cause,

the officer may safely proceed. That from some cause not shown in the writ, the judgment or writ was irregular or void, will be of no consequence to him. He can justify upon producing the writ. It is therefore immaterial to him that the judgment does not correspond to the writ or that there ever was any such judgment in existence.'

"Judgment and order reversed and cause remanded for a new trial."

A sheriff makes out a *prima facie* case of justification of the seizure of property under a writ of attachment by the production of the writ and affidavit on which it was issued, notwithstanding the affidavit was originally insufficient, and was amended subsequent to the seizure, if the property was in possession of the defendant and attached as his property. (*Babe v. Coyne*, 53 Cal. 261.)

§ 639. **Duress of goods.** The issuance of an attachment and levy of the same on goods, if there be a legal cause of action existing, is not such a duress of goods as to give a cause of action for damages in favor of the one whose goods are seized. (*Kohler v. Wells, Fargo & Co.*, 26 Cal. 606.) Proof of injury to plaintiff's business as a criterion of damages is inadmissible.

§ 640. **Liability of officer and sureties for trespass.** Where a sheriff or constable seizes the property of one man under an execution against another he is a trespasser and liable on his official bond. (*Van Pelt v. Littler*, 14 Cal. 194.) An action on the official bond of an officer lies primarily upon the breach of the condition of the bond, whether the

injury for which suit is brought be a trespass or not—the result of the non-feasance or misfeasance of the officer. In the decision here cited the suit was brought upon the official bond of a constable against the officer and his sureties to recover damages for an illegal seizure of the property of the plaintiff under an execution against other parties. It was contended that the suit was improperly brought upon the official bond of the constable; that the sureties are not liable on the bond in the first instance, and that the only remedy primarily is an action of trespass against the officer alone. The condition of the bond being that the officer shall well and faithfully discharge the duties of his office, it was held that there could be nothing in that point. The bond is a contract by which the officer and his sureties in effect covenant and agree not only that the officer will faithfully perform the duties enjoined by law, but that he will not by virtue or under color of his office commit any illegal or improper act. It is no answer to an action upon the official bond of an officer that the party complaining has not chosen to pursue some other equally available and proper remedy.

The law is well settled that a sheriff is answerable for the wrongful acts of his deputy, committed under color of his office, and in the pretended discharge of his duty. If the deputy levy an execution against A upon the property of B, the sheriff is liable; and he is liable not only in a private and individual capacity, but in his public and official character, and upon his official bond. This liability rests alone upon the ground of the official relation existing between the parties, and can be enforced only as to such acts of the deputy as are connected with the performance

of his official duty. He is no more answerable for a naked trespass committed by the deputy than any other person, but the wrongful acts of the deputy, done under color of process, are deemed official, and for such acts he is liable. This being admitted, and its correctness seems never to have been questioned, it is difficult to perceive any satisfactory reason why similar acts of the sheriff himself should not be held of the same character, in order to charge his sureties. Our statute makes no distinction between the liability of a sheriff and a constable. The legislature intended that the officer and his sureties should be responsible for every abuse of his official powers, and there could not well be a more flagrant abuse of such powers than the seizing and selling of the property of one person under and by virtue of an execution against another. He does not act in such a case in a private and individual capacity, but as an officer, clothed with official authority, and protected by the judgment of a court and the process which he intends to execute. No resistance can lawfully be made by any person whose property is thus taken. The property itself may be detained whether legally taken or not, and a summary mode is provided for the protection of the officer, to determine disputes in regard to the title. "To hold that such an act is not official," say the court in the case above cited, "at least so far as to charge the sureties, it appears to us, would be in contravention of the spirit and intention of the statute, and would certainly operate most unjustly upon persons whose property may be taken by an officer who is insolvent and unable to respond in damages for its value."

In a suit brought on the official bond of defendant, Webster, who was sheriff of San Joaquin County, against Webster and his sureties to recover damages for the levy by Webster on property of one Pico, which levy was made under color of process, it was held (*Pico v. Webster*, 14 Cal. 203, 73 Am. Dec. 647) that, where the surety undertakes that his principal shall pay any judgment to be rendered, etc., the judgment against the principal is conclusive against the surety.

But in the case of official bonds the sureties undertake in general terms that the principal will perform his official duties; and a judgment against the officer in a suit to which they were not parties, is not evidence against them.

§ 641. **Measure of damages for detaining personal property.** In actions for taking and detaining personal property, no circumstances of aggravation being shown, the measure of damages is the value of the property with interest. If circumstances of aggravation be shown in order to increase the damages, then defendant may show all circumstances connected with his acts and explanatory of his motives and intentions. In such actions the rule of damages depends on the presence or absence of circumstances of aggravation in the trespass as fraud, malice, or oppression. In the absence of such circumstances the rule is compensation merely, and this refers solely to the injury done to the property, and not to collateral or consequential damages resulting to the owner. And the measure of relief is matter of law. But where the trespass is committed from wanton or malicious motives, or a reckless disregard of the

rights of others, or under circumstances of great hardship and oppression, the rule of mere compensation is not enforced, and the measure and amount of damages are matters for the jury alone, and they may award punitive or exemplary damages.

The rule of compensation merely, as distinguished from the rule of exemplary damages, applies, even though the writ under which the officer committed the trespass was void, there being no circumstances of aggravation. (*Dorsey v. Manlove*, 14 Cal. 553.)

In an action against a sheriff for wrongfully seizing and selling property under an execution, and where there was no wantonness or oppression on the part of such officer in the seizure, the measure of damages is the value of the property at the time it was seized, and legal interest on such amount from the time of seizure up to the time of the rendition of the verdict. (*Phelps v. Owens*, 11 Cal. 25.)

The rule giving vindictive or exemplary damages in cases of malicious trespass, applies as well to officers of the law acting under color of process as to private persons. In a suit against a sheriff and the plaintiff in a judgment for a wrongful seizure of property on an execution upon such judgment, the sheriff who acted without improper motives cannot be made liable in vindictive or exemplary damages on account of the malicious motives of the plaintiff in the writ. The motives of plaintiff cannot be given in evidence in aggravation of damages against the sheriff. (*Nightingale v. Scannell*, 18 Cal. 315.)

In the case of *Selden v. Cashman*, 20 Cal. 67, 81 Am. Dec. 93, action for damages for trespass for the seizure of a stock of goods under an execution issued upon a void judgment, the court held that the fact

of the invalidity of the judgment was not sufficient to warrant the conclusion that the seizure was malicious. There was nothing extraordinary attending the seizure, and the course ordinarily adopted in such cases seems to have been substantially pursued. The seizure was undoubtedly a hardship upon the plaintiff, but there was no evidence of any wrongful design or willful misconduct tending to aggravate the offense. The case presented was that of a simple trespass, and the court below acted properly in refusing to allow exemplary damages.

To maintain *trover* or *trespass de bonis asportatis* evidence of an actual forcible dispossession of the plaintiff is not necessary. Any unlawful interference with the property or exercise of dominion over it, by which the owner is damaged, is sufficient to maintain either action. It was held, accordingly, in *Rider v. Edgar*, 54 Cal. 127, in an action by a mortgagee of personal property against a sheriff for taking the same under attachments against the mortgagor, that a levy upon a part of the property in the possession of the mortgagor, and the appointment of a keeper, was a *taking*, although the property was not moved or otherwise disturbed, and though it was released before any demand from the plaintiff.

In an action for trespass (*Pacheco v. Hunsacker*, 14 Cal. 120), brought by one Pacheco against Hunsacker as sheriff, for seizing and taking away certain grain, the property of plaintiff, the defendant admitted the seizure, averring that it was done by virtue of a writ of attachment issued at the suit of *Dutil v. Andeque*; that he sold the undivided two-thirds interest in the wheat, as perishable property, for four hundred and ninety-five dollars; that at the

time of the seizure Andeque had a leviabie interest in the wheat, and that Dutil was a *bona fide* creditor. The wheat was in five stacks and was left by the sheriff in charge of a keeper until the day of sale. At the sale the sheriff announced that he only sold the undivided two-thirds interest of Andeque. Pacheco was present and notified the sheriff that if he sold he, Pacheco, would abandon his one third and claim of the sheriff the whole value. The purchaser at the sale afterwards went onto the land, threshed out the whole of the five stacks, and kept the wheat. The sheriff retained the four hundred and ninety-five dollars to abide the event of this suit. A few days before the seizure by the sheriff Andeque sold to Pacheco these five stacks, pointing them out specifically, executed a bill of sale, left the ranch, and did not return.

The court below, among other things, instructed the jury that the plaintiff was entitled to recover, if at all, the value of all the grain taken. The jury found for plaintiff fourteen hundred and fifty-seven dollars. Judgment was rendered accordingly, and defendant appealed. The supreme court held that the plaintiff was entitled to the value of all the grain taken.

In an action to recover the possession of personal property, with damages for its detention, the judgment may be for more than the value as alleged in the complaint, if it be within the *ad damnum* of the writ. The value of the property is only one predicate of the recovery. (*Coghill v. Boring*, 15 Cal. 213.) The rule is, where the property converted has a fixed value, the measure of damages is that value, with legal interest from the time of conversion.

When the value is fluctuating the plaintiff may recover the highest market value at the time of the conversion, or at any time afterwards. (*Hamer v. Hathaway*, 33 Cal. 117.)

An officer holding goods under a writ of attachment is liable on his bond for any damage thereto occurring through his carelessness or negligence. (*Wilkowski v. Hern*, 82 Cal. 604, 23 Pac. 132.)

In an action to recover damages from a sheriff for a wrongful seizure of plaintiff's goods under writs of attachment issued in suits against his son, where, on motion of the plaintiff made in such actions, the attached property has been restored by order of the court to him, exemplary damages, attorney's fees, and other expenses attending the hearing of such motion should not be awarded in the absence of any showing of fraud, malice, or oppression. (*Adams v. Gillam*, 53 Kan. 131, 36 Pac. 51.)

§ 642. **Seizure of mortgaged personal property—Damages.** Under a statute requiring the officer to pay or tender the amount of the mortgaged debt before he can levy upon mortgaged personal property, if the officer sells and converts such property without such tender, the mortgagee is entitled to recover of the officer the amount of the mortgage debt with interest. (*Sherman v. Finch*, 71 Cal. 68, 11 Pac. 847.)

§ 643. **When replevin will not lie.** When an officer has sold personal property under execution, and parted with possession of it, the action of claim and delivery will not lie against him. (*Riciotto v. Clement*, 94 Cal. 105, 29 Pac. 414.)

§ 644. **When judgments cannot be set off.** A sheriff will not be allowed to take advantage of his own wrong, and by an illegal act defeat the purpose of the statute. In the case of *Beckman v. Manlove*, 18 Cal. 389, plaintiff recovered judgment against defendant for seizing, as sheriff, under execution, certain exempt property. Defendant then procured an assignment to him of the judgment on which the execution issued, and moved the court to set off this latter judgment against the former: *Held*, that the motion was properly denied; that, defendant being sued as a wrongdoer, the judgment of plaintiff for the value of the property must, as between plaintiff and defendant, be regarded as standing in place of the property; and that if defendant were allowed in this way to take advantage of his own wrong, he would practically defeat the purpose of the exemption law.

§ 645. **Joinder of sureties.** The sureties on the bond of a sheriff may properly be joined as parties defendant in an action against him to recover personal property wrongfully taken on execution, and for damages for its detention. (*Sam Yuen v. McMann*, 99 Cal. 497, 34 Pac. 80.)

§ 646. **Liability of sheriff's sureties.** Sureties on the sheriff's official bond in this state are entitled to stand upon the precise terms of their contract, by which they stipulate for his official, not his personal, dealings. In the case of *Schloss v. White*, Sheriff, 16 Cal. 68, suit brought on a sheriff's bond against the officer and his sureties, the plaintiff sued out attachment against one Kalkmann, and had it levied

on some goods. Other creditors issued similar process, also levied on the same goods; and afterwards the plaintiff dismissed his proceeding, and claimed that the goods levied on, or a part of them, were his own property, they having been procured by Kalkmann by false pretenses. The plaintiff sued the sheriff in replevin. He did not take the goods out of the sheriff's possession, but came to an arrangement with the sheriff whereby the sheriff agreed to sell the goods and keep the proceeds to answer the judgment if the plaintiff obtained one in his replevin suit. The sheriff sold the goods and paid the money into court, saying nothing about this arrangement; and the money was paid, under the order of the court, on the claim of the other creditors. The court held as follows: "The sureties of the sheriff had nothing to do with and gave no sanction to this arrangement. The question is, Are they bound to the plaintiff for the goods or the money received from the sale—the plaintiff having obtained judgment in the replevin suit? We think they are not. It was no part of the sheriff's duty to make this agreement with the plaintiff to sell the goods and to hold the proceeds for the plaintiff in a certain event. He had no legal authority, as sheriff, to sell these goods and to hold the money on bailment for the plaintiff. If the plaintiff trusted him with the custody of the goods, and gave him authority to sell them, he became, so far, the agent of the plaintiff, and the plaintiff must look to him merely as his agent; he cannot hold the sureties bound for executory contracts of this sort, entered into without their consent. If so, there would be scarcely a limit to their responsibility; for contracts of this sort might run for years, and represent every

variety of complication. If the sheriff had retained the goods, he might have obtained a bond of indemnity from the other creditors; or if the plaintiff had given bond, he might have relieved the sheriff from the custody of the goods. But here the sheriff assumes by this agency a responsibility for himself and his sureties, greater in degree and different in kind from that imposed by law, and it would be unjust and impolitic to encourage such dealings by holding sureties responsible for them."

Where the obligors in a sheriff's bond bind themselves, jointly and severally, in specific sums designated they may all be joined in the same action, but separate judgments are required. (*People v. Edwards*, 9 Cal. 286.)

The sureties of a sheriff are not liable for any statutory penalty imposed upon him for neglect of official duty. The sureties are liable only for actual damages sustained. (*Glascock v. Ashman*, 52 Cal. 493.)

§ 647. **Sheriff's notice to sureties.** It is of the greatest importance to an officer that the sureties on an indemnity bond given to him be promptly notified of any suit brought against him by a party claiming property seized under process. Section 1055 of the Code of Civil Procedure of California provides that "if an action be brought against a sheriff for an act done by virtue of his office, and he give seasonable notice thereof to the sureties on any bond of indemnity received by him, and permits them to conduct the defense of such action, the judgment recovered therein shall be conclusive evidence of his right to recover against such sureties; and the court may, on motion, upon notice of five days, order judgment to

be entered up against them for the amount so recovered, including costs." (*Code Civ. Proc.*, sec. 1055; *Stats.* 1907, p. 309.)

If a sheriff is indemnified for an act done by virtue of his office, and an action is brought against him to recover damages for the act, and judgment is recovered against him, the sheriff cannot afterwards have judgment entered on motion in that action against the sureties on the indemnifying bond unless he give the sureties written notice of the action brought against him. He cannot avail himself of this remedy, but is left to his action upon the indemnity bond. (*Dennis v. Packard*, 28 Cal. 101.)

§ 648. **Defect in sheriff's bond—No defense.** The defect in the approval of a sheriff's bond cannot be set up as a defense in an action on said bond against the sureties. The object of the law in requiring the approval is to insure greater security to the public, and it does not lie in the obligors to object that their bond was accepted without proper examination into its sufficiency by the officers of the law.

§ 649. **Bond to indemnify sheriff for unlawful act.** A bond given to a sheriff to indemnify him for any loss or damage he may sustain by selling property levied on by him by virtue of an execution in violation of an order enjoining its sale is void, because an unlawful contract. (*Buffendeau v. Brooks*, 28 Cal. 642.) In this case the judgment had been set aside and a temporary injunction issued. The bond was dated June 16th, but was not delivered to the sheriff until June 28th, the day of the sale. The sheriff erroneously supposed that the bond would

indemnify him for selling, notwithstanding the restraining order.

§ 650. **Agreement to indemnify sheriff.** An agreement to indemnify a sheriff for seizing property under execution is valid if the parties are in good faith seeking to enforce a legal right; but an agreement to indemnify a party for a willful trespass about to be committed is against public policy and void. In the case of *Stark v. Raney*, 18 Cal. 622, wherein the sheriff seized and sold a wagon on execution in favor of Raney, who pointed out the wagon, requested the sheriff to seize it, and verbally agreed to hold him harmless, etc., it was held, in a suit by the sheriff against Raney for damages recovered against the sheriff for the seizure, that the agreement to indemnify is valid; that it was not a "special promise to answer for the debt, default or miscarriage of another," within the statute of frauds—because the sheriff was acting not for himself, but as agent of Raney, and the promise was to be responsible for his acts as such agent. It was held, further, that the sheriff was entitled to recover, not simply the value of the property which he had been compelled to pay, but also the costs incurred by him in defending the suit brought to recover such value; that his claim to indemnity extends to the entire damages to which he had been subjected on account of the seizure.

§ 651. **Liability of sureties on indemnity bonds.** Where a sheriff seizes goods on two attachments in behalf of different plaintiffs, and the property being claimed by a third person, the plaintiffs in the attachment suits execute to the sheriff separate indemni-

tying bonds, there is no joint liability between the plaintiffs to the sheriff. Each bond must be sued on as an independent obligation. Where an indemnity bond is given to a sheriff to hold him harmless, and pay any judgment which may be rendered against him by reason of his seizure of certain property, his remedy at law on the bond is clear for the amount of any such judgment, whether he be solvent or not, or whether his official sureties could be held or not, and a bill in equity will not lie. (*White v. Fratt*, 13 Cal. 521.)

A bond was given by a plaintiff to a constable to indemnify him from liability for selling certain property claimed and actually owned by persons other than the execution debtor; and the property having been sold, and the owners having sued the constable and recovered judgment against him, the latter assigned the bond to them, and they released him from liability on the judgment: *Held* (*McBeth v. McIntyre*, 57 Cal. 49), that the release of the constable did not operate to release the obligors on the bond. Substantially, the constable paid the judgment against him by assigning the bond.

§ 652. **Alteration of bond.** In an action by a sheriff on an indemnity bond it appeared that after its execution the bond had been altered by substituting "C. J. Hubner" for "J. M. Berry" as the claimant of the property seized by the sheriff, and afterwards, and before the trial, by erasing the former and restoring the latter name, thus restoring it to its original condition, but there was no allegation or proof that the alterations were made with a fraudulent design, or that the defendants could possibly be injured

by them: *Held* (*Rogers v. Shaw*, 59 Cal. 260), that the alterations did not render the instrument void.

§ 653. **Conditions of indemnity bond.** If in a bond to indemnify a sheriff for replevying property claimed by a person other than the defendant in the writ the obligors undertake to indemnify him from any damage he may sustain by reason of any costs, suits, judgments, and executions that shall come or be brought against him, the sheriff cannot maintain an action on the bond because a judgment has been recovered against him, but must first pay the judgment. (*Lot v. Mitchell*, 32 Cal. 24.) In this case the obligors do not undertake anything except they will indemnify the sheriff from any actual damage that he may sustain by reason of any costs, suits, judgments, and executions that shall come or be brought against him.

When a sheriff takes an indemnity bond against the claim of a third party in attachment or execution, and it is provided in the bond that the officer may retain for a reasonable time, as additional security against such claim, all moneys that may come into his hands by reason of said attachment or any execution in said action, the term "reasonable time" will enable the officer to retain such moneys until the determination of any suit that has been brought against him therein by the claimant. (*Scherr v. Little*, 60 Cal. 614.)

§ 654. **Actions upon indemnity bonds.** Instances of disastrous results from loosely drawn complaints in actions to recover upon undertakings given to prevent the levy, and for the release of attachments, are so frequent that a word or two upon that subject is

deemed not out of place in this work. If the complaint does not aver either that the giving of the undertaking sued on prevented the levy of the attachment, or that the property was released upon the giving of the undertaking, it fails to aver the very gravamen and essential gist of the cause of action itself. In an action upon an undertaking given to prevent the levy of an attachment, in the case of *Coburn v. Pearson*, 57 Cal. 306, the complaint stated that the sheriff did proceed to levy upon and attach certain personal property; and that before the completion of said levy the defendants, for the purpose of preventing the levy or the completion thereof, tendered the sheriff the undertaking required by law, etc., which undertaking was duly taken and accepted by the sheriff. It was held that the complaint was defective in not stating that the sheriff did not complete the levy, or that he proceeded no further therewith. In this case the court said:—

“Assuming that the words ‘did proceed to levy upon,’ etc., do not necessarily imply that the sheriff took the property into his possession (and any acts clearly indicating his purpose to subject it to his control, would give the sheriff the legal possession as against the defendant in attachment), the complaint contains no averment that the sheriff did not ‘complete’ the levy, or that he proceeded no further therewith. This would seem to be necessary. It is urged that the averment that the sheriff duly took and accepted the undertaking is sufficient, inasmuch as that it will be presumed that the sheriff did his duty, and that he would not have taken the undertaking and *also* the property. But such presumptions are applied, in proper cases, as a rule of evidence, not of

pleading. A party must allege the material ultimate facts, even although some other fact, if proven, might create a presumption of the existence of one of the facts alleged. Besides, here there can be no doubt that the burden was cast on plaintiff at the trial to prove the cessation of proceedings towards a levy, or a return of the property to the extent to which a caption had been effected. Otherwise, the consideration of the undertaking (not under seal) would not be proven. In *Palmer v. Melvin*, 6 Cal. 651, it was held that a complaint upon a bond given to release property from attachment was defective, because it did not aver that the property was released upon the delivery of the bond." The court said: "It is necessary to allege the consideration for the undertaking, and a mere reference to the condition of the bond is insufficient." The same rule is laid down in *Williamson v. Blattan*, 9 Cal. 500, where the court say, further, that "the failure to allege the release of the property may be taken advantage of by *general demurrer*." In *Nickerson v. Chatterton*, 7 Cal. 568, it was held that in an action against the sureties on a replevin bond it is necessary to allege that the property was delivered to the party for whom the bond was given; in *Los Angeles v. Babcock*, 45 Cal. 252, that in a suit on a bail bond the complaint must allege that the person bailed was released from custody; in *Jenner v. Stroh*, 52 Cal. 504, that when action was commenced on an undertaking given to procure the vacation of a default judgment, the complaint should have averred that the judgment was set aside. In such cases the consideration for which the undertaking is executed and delivered must be alleged and proved.

§ 655. **Plaintiff bound by his bond.** In the case of *Graves v. Moore*, 58 Cal. 435, the plaintiff, as sheriff, under an execution in favor of the defendants, Moore, Hunt & Co., levied on certain personal property, including a billiard table; but before the sale Strahle & Co. and also one Soberanes each claimed the property pursuant to section 689 of the Code of Civil Procedure. The sheriff sent written notice of the claim made by Soberanes, and also (it is claimed) of the claim of Strahle & Co., to Moore, Hunt & Co., who delivered to the sheriff an indemnity bond against the claim of Soberanes, and ordered him to sell. After the sale Strahle & Co. sued the sheriff for the value of the property, which was paid. In an action brought by the sheriff to recover the amount of the judgment, also \$100 paid as counsel fees, the court found, among other facts, that the plaintiff notified the defendants of the claim of Strahle & Co., and was thereupon directed to sell. It appears that upon being served with the summons in the suit brought against him by Strahle & Co. the sheriff notified the attorney of Moore, Hunt & Co., who appeared in the action, but afterwards abandoned the same, and notified the sheriff that they would make no further defense. The court found that the officer was entitled to recover not only the amount of the judgment, but also counsel fees, because Moore, Hunt & Co., by their agreement of indemnity, engaged to save the sheriff from the legal consequences of selling the property of the claimant, and their engagement applied not only to the act of selling, but to all the consequences resulting to him from that act. (*Civ. Code, secs. 2772, 2775.*) Having been compelled to pay by the judgment against him, he had a right to recover

not only the amount of the judgment, but the expenses attending the action which he had to defend. (*Duffield v. Scott*, 3 *T. R.* 374; *Stark v. Raney*, 18 *Cal.* 622.)

The judgment against the sureties is conclusive evidence of his right to recover against them on the bond of indemnity, nor can they complain, as by virtue of section 387 of the Code of Civil Procedure of California, the sureties have the right to intervene in the suit against the officer and defend the suit as a party to the record.

§ 656. **Judgment against sheriff.** The provision of the statute making the judgment in an action against a sheriff conclusive evidence against his indemnifier, where the latter has been notified of the action, is founded upon the principle that the action under such circumstances is in substance against the indemnifier—the real party in interest—and that he has in that action an opportunity to make any defense that may exist. Where, therefore, the indemnifier has been notified of the action against the sheriff, he cannot maintain a bill in equity to set aside the judgment obtained therein, except under such conditions as would have enabled him to maintain it had he been the nominal as well as real party defendant to the first action. (*Dutil v. Pacheco*, 21 *Cal.* 442, 82 *Am. Dec.* 749.)

§ 657. **An estoppel that protects the sheriff.** If a court or referee on proceedings supplementary to execution orders property of the judgment debtor to be delivered up to the sheriff to be sold on the execution, the judgment creditor is estopped by the order

from maintaining an action against the sheriff for selling the property. (*McCullough v. Clark*, 41 Cal. 304.) In this case the judgment debtor had an insurance policy which he claimed to be exempt from execution. The court decided that that particular policy was not exempt, and that the sheriff, in seeking to apply it toward the payment of the judgment in obedience to that order of the court, was only performing a duty enjoined upon him by law, and, therefore, could not be treated as a wrongdoer.

§ 658. **Indemnity bond—Jurisdiction of courts.** In an action against the sheriff by claimants of attached property, when judgment has been rendered against him, and he moves for judgment over against the sureties on an indemnity bond given to him under section 1055 of the Code of Civil Procedure, the superior court, in which the action was brought, has jurisdiction to give judgment against the sureties, although each is bound for less than three hundred dollars. (*Moore v. McSleeper*, 102 Cal. 277, 36 Pac. 593.)

§ 659. **Penalty for not paying over moneys.** The statutory penalty against sheriffs for the non-payment of moneys collected on execution is only recoverable when the sheriff, by his return, admits the collection of the money, but refuses to pay it over. If it were otherwise, an error in judgment, or even a hesitation to decide between adverse claimants, might work the ruin of any honest and conscientious officer. The statute gives twenty-five per cent damages on the amount collected, and ten per cent per month in addition, from the time of the demand. It not infre-

quently occurs that a sheriff, on account of contests between creditors, and his own inability to decide the right, declines a demand, which turns out to have been justly and properly made. In such a case, to deprive him of the benefit of his return and visit upon him the heavy penalties of the statute for failing to pay the money on demand, would be a cruelty and injustice which the law never contemplated. The argument that sheriffs might avail themselves of this doctrine and make false returns, so as to avoid the penalties of the act, should be without any weight, and not entitled to consideration. The courts will presume that every officer will faithfully perform his duty, and has done so in every instance, until the contrary is shown.

§ 660. **Remedy by motion.** The remedy by motion against a sheriff and his sureties to compel him to pay over money collected on execution was only given for cases of intentional delinquency on the part of the sheriff as a punishment for his willful or corrupt neglect of duty, and was not designed to embrace a case in which he declined to pay over moneys collected under circumstances of a *bona fide* well-grounded doubt of the authority of the party to demand it. (*Wilson v. Broder*, 10 Cal. 486.)

§ 661. **Liability for acts of deputy.** In an action of trespass against a sheriff, where he is declared against personally and not as sheriff, it is competent to prove that the defendant was sheriff and that his deputy as such committed the trespass. The sheriff is liable for the acts of his deputy. In such a case it is not necessary to prove that the defendant directed

his deputy to seize the particular property in question in order to hold the defendant liable. (*Poinsett v. Taylor*, 6 Cal. 78. See, also, sections 17, 640, *ante*.)

§ 662. **Officer not responsible through laches of another.** It is held, in *Luck v. Madden*, 36 Cal. 208, wherein a county clerk was sued for an alleged failure to perform his duty in the matter of issuing a writ of attachment, that "although public officers should be made to answer in damages to all persons who may have been injured through their malfeasance, omission, or neglect, but if the damages would have been sustained, notwithstanding the mal-conduct of the officer, or if the injured party has by his fault or neglect contributed to the result, the officer cannot be held responsible."

§ 663. **Release of sheriff by stipulation.** Where an action of replevin is brought to recover property in the possession of a sheriff under attachment, and the parties stipulate that the property shall be turned over to a third party to await the final judgment in the cause, the sheriff is released from all liability, and a judgment *in form* only can be taken against him. (*Temple v. Alexander*, 53 Cal. 3.)

§ 664. **Offices of sheriff and tax-collector are separate.** The offices of sheriff and tax-collector are as distinct as though filled by different persons. The duties and obligations of the one are entirely independent of the duties and obligations of the other. They are not so blended that the bond executed for the faithful performance of the duties appertaining

to the one would embrace, in the absence of the statute, the obligations belonging to the other. (*People v. Edwards*, 9 Cal. 286.)

§ 665. **Principal and deputy—Levy of separate writs.** In the case of *Whitney v. Butterworth*, 13 Cal. 336, 73 Am. Dec. 584, the court said: "This question touches the liability of the sheriff for not levying an attachment put in his hands on Sunday; the goods of defendant having been seized by his deputy on Monday, though the last writ came to his hands early on the same day and was levied on the property which was disposed of by the last writ—so that the first remained unsatisfied. . . . The speed with which the sheriff must proceed may depend upon the apparent necessity for quick action. But we have found no case which holds that the mere delay of a few hours, without some showing of special urgency has been held sufficient to charge the sheriff. If we suppose, then, that the process reached the hands of the principal sheriff at one o'clock on Monday morning, we do not perceive that the sheriff would have been liable—nothing else appearing—for failure to levy it before. But the particular facts of this case make it stronger for the sheriff. The attachment of plaintiff was placed in the principal sheriff's hands on the night of Sunday between nine and ten o'clock. But it did not legally come to his hands as sheriff and for service until twelve o'clock. Fifteen minutes after twelve the other attachment came to the hands of the deputy; of this, it seems, the sheriff had no notice; and the deputy levied it at or about one o'clock. It seems, then, that the laches of the sheriff in delaying this levy for an hour at mid-

night, is the foundation of his liability. This would be too harsh and unreasonable a requisition. It is plausibly argued that the deputy and his principal are the same person in law; and that the attachment in the hands of the defendants is, in legal effect, in the hands of the principal; and, consequently, the case is that of an officer having a senior writ and levying a junior writ on the property of the defendant. But the answer to this argument is that here the question is one of diligence, and that it cannot be contended that the mere omission of the deputy to inform the principal of his having process is such negligence as to charge him.

“We have seen that the sheriff is not absolutely responsible for not executing process of this sort. He is responsible for unreasonably or not reasonably executing such process. But the test is, Was a failure, in the absence of any special circumstances, to execute *this* process, unreasonable, or did it subject the sheriff to responsibility for the debt? We may in this connection leave out of question the discussion as to the day (Sunday) on which the writ of the plaintiff was received. It is certain that, for all judicial purposes, Sunday is no day at all. The sheriff need not on that day indorse on the writ the fact of its reception. If given to him on that day he did not receive it as an officer, but as the mere agent of the plaintiff. He could do nothing with it on that day. He might, if he chose, recognize the receipt of it, but it imposed on him no higher or other duties than if he had received it on the next day. He, for all practical purposes, so far as respects this writ, was not the sheriff at all on Sunday. But we may safely concede, for all purposes of this suit, that he received the process

on the next day and even at the beginning of that day. Was he bound, then, on this assumption to go on and execute the writ immediately after having received it, no peculiar necessity or apparent reason being shown why he should do so? No authorities have been cited to show that a sheriff is bound to quit everything else immediately on receiving an attachment or execution, and proceed to levy.

“The deputy had received Clark & Co.’s attachment early in the morning of Monday, perhaps at the very instant which marked the period which separated Sunday from Monday in the computation of time. But though Whitney’s writ was in the hands of the sheriff before this time, yet the sheriff could do nothing with it—did not legally even receive it in his official capacity before. His connection with the writ of Whitney, as sheriff, commenced at the very time—at the utmost—when his deputy had the writ of Clark. But if Clark had no writ, we do not see that the sheriff would have been bound to go at once, on the instant when Monday commenced, and levy on the property of the defendants in attachment. Nor was the sheriff bound to the degree of diligence which required him to communicate to his deputy the intelligence that he had received the writ of Whitney before the deputy levied the process of Clark. Attachments do not bind the property of the defendant from the time of the issuance, but only from the time of the actual levy, and the attachment first levied, by our statute, has the priority.

“But, probably, we might put this case on a broader ground. The sheriff could no more officially receive a writ on Sunday for service on Sunday than he could execute it on Sunday. Both these acts are

of the same general character and equally within the prohibition of the statute. Not receiving it then as sheriff, he received it as the mere agent of the plaintiff. He so received it, not to execute it on Sunday, or to deal with it as a writ coming to him on that day as an officer. He might have been bound, as an agent, to deliver it to the sheriff, or to treat it as delivered when he could act. But this was a personal, not an official contract; it was a mere bailment which bound him, probably, as a man, but did not bind him as a sheriff, and, if he chose to disregard it entirely, we do not see that he would be bound as an officer. It is not necessary to press this point, for the reason that if he was bound to consider it as placed in his hands on Monday, at one o'clock, there was no such negligence in failing to execute it before as to subject him to liability. It is true that it may be urged that the sheriff and the deputy are one person in law; true, so far as this, that the sheriff is responsible for the acts of the deputy; but no one would contend that if a sheriff has a deputy at a remote precinct of a county, and a writ is placed in his hands, and he executes it on property in his precinct, that the sheriff would be responsible for this, if the consequences were to deprive B of the recovery of a claim as the result of this levy—B having put a writ in the hands of the sheriff, at the county seat, an hour before the writ was placed in the hands of the deputy. Whitney trusted the sheriff to consider that the writ would be in his hands on Monday, and to receive and execute it as if it were handed to him on that day; but even if it had been, the sheriff was not bound to get out of his bed (no special circumstances existing) on the morning of that day at one o'clock and immediately

proceed to the execution of the writ. It would be unjust to hold the sheriff to this degree of diligence, and, we think, illegal. We reverse the judgment, and remand the case." (*See, also, sec. 222, ante.*)

CHAPTER XXIII.

WRIT OF ASSISTANCE.

- § 666. Object of the writ.
- § 667. Plaintiff entitled to immediate service.
- § 668. Against whom will issue.
- § 669. When writ will be refused.
- § 670. When writ of assistance may issue.
- § 671. Where tenants in common.
- § 672. Who not to be removed.
- § 673. Alias writ.
- § 674. False return.

§ 666. **Object of the writ.** A writ of assistance is the appropriate remedy to place the purchaser of mortgaged premises, under a decree of foreclosure, in possession, after he has obtained the sheriff's deed.

§ 667. **Plaintiff entitled to immediate service.** Under the writ of assistance the party for whose benefit it is issued is entitled to immediate possession. The writ commands the sheriff to forthwith place the plaintiff in possession, and it is only by his consent that any delay in its service can be permitted.

In the case of *Chapman v. Thornburg*, 17 Cal. 87, 76 Am. Dec. 571, where the sheriff received a writ of assistance, commanding him forthwith to deliver possession of certain real estate to plaintiff, and went with plaintiff to the premises for the purpose of putting him in possession, but for some reason not stated—in opposition to plaintiff's wishes and against his protestations—he declined to take any action in the

matter, and then, on a subsequent day, the sheriff proceeded to execute the writ; but the parties in possession, being the parties against whom the writ ran, had in the mean time destroyed a number of valuable fixtures, and by their willful and malicious acts had injured the premises in other respects: *Held*, that the sheriff was liable for the damage thus done; that he was presumed to know what his duty was, and to have acted in willful violation of it; and that, as his duty was to execute the writ at the earliest practicable moment, and he neglected and refused so to do, it was through his fault that the parties in possession were enabled to commit the injury, and he must respond in damages, however remote.

§ 668. **Against whom will issue.** A writ of assistance can only issue against the defendants in the suit and parties holding under them who are bound by the decree. In a suit for foreclosure all persons interested in the premises, prior to the suit, whether purchasers, heirs, devisees, remainder-men, or encumbrancers, must be made parties, otherwise their rights will not be affected. The purchaser under a decree takes a title only as against the parties to the suit. (*Montgomery v. Tutt*, 11 Cal. 314.)

One Lefevre, a married man, purchased certain real estate, subject to a mortgage thereon, which had been previously executed by his grantor, and soon afterwards died. The mortgagee commenced an action to foreclose the mortgage, making the executors of Lefevre, but not the widow, a party, and after a decree of foreclosure and sale and expiration of the time of redemption received the sheriff's deed (himself being the purchaser), and thereupon applied to

the court for a writ of assistance against the widow, who retained possession of a portion of the premises, which on demand she refused to surrender: *Held*, on appeal from an order denying the writ, that the denial was proper; that the estate conveyed to Lefevre became thereby the common property of himself and wife; that upon his death the title to one half of this property vested in her, subject only to the mortgage and the lien for the payment of debts; that this title was not affected by the proceedings in the foreclosure suit to which she was not a party; and that, not being bound by the decree, a writ of assistance could not be issued against her. (*Burton v. Lies*, 21 Cal. 88.)

A person who, pending an action for the foreclosure of a mortgage, and with notice of its pendency, purchases from one of the defendants therein a portion of the mortgaged premises, occupies the same position as his grantor in reference to the issuance of a writ of assistance in favor of the purchaser under the decree. (*Montgomery v. Byers*, 21 Cal. 107. *See, also, secs. 670, 671, post.*)

§ 669. **When writ will be refused.** If the court in an action to foreclose a mortgage does not acquire jurisdiction of the person owning the land at the time of the foreclosure, a writ of assistance against the owner or his grantees will be refused. (*Steinbach v. Leese*, 27 Cal. 296.)

A writ of assistance will not be issued against a purchaser of the mortgaged premises who buys during the pendency of a suit to foreclose and who is not a party to the suit without actual or constructive notice of its pendency. (*Harlan v. Rackerby*, 24 Cal. 561.) In this case the *lis pendens* in the foreclosure

suit was filed subsequent to the purchase of the property from the defendant in that suit, and the purchaser was entitled to be heard in his defense before he could be deprived of his property.

In *Langley v. Voll*, 54 Cal. 435, upon an application for a writ of assistance to place the grantee of the purchaser of real estate under a judgment sale in possession, it appeared that the defendants had acquired, or claimed to have acquired, a new right to the possession from the purchaser; it was held that the writ should have been denied and the parties left to settle their rights in a regular suit.

A party who forecloses a mortgage given by one partner on, and obtains a sheriff's deed for, an undivided interest to partnership property, without making the other partner a party to the action, is not entitled to a writ of assistance to be placed in possession as against a receiver who has been appointed by the court, at the instance of such other partner, in an action commenced by him to dissolve the partnership and have the partnership property sold to pay the debts. (*Autenreith v. Hessenauer*, 43 Cal. 356.)

§ 670. **When writ of assistance may issue.** The power of a court to issue writs of assistance is limited to sales on judgments rendered by the same court to which the application for a writ of assistance is made, and also for the putting in possession of a purchaser under a constable's deed, in which last case the writ may issue out of the proper court of record upon showing made as to the judgment under which sale was made. (*People v. Doe*, 31 Cal. 220.)

If the decree in a foreclosure suit directs the sale of all the mortgaged premises, and forecloses and

bars the equity of redemption of the defendants, and directs that the purchaser at the sheriff's sale be let into possession, the person who receives the sheriff's deed after a sale is entitled to a writ of assistance as against all the defendants who were served with process or appeared in the action. This rule prevails as against a defendant who is not mentioned in the decree by name, and also against one whose name is not mentioned in the sheriff's deed. (*Frisbie v. Fogarty*, 34 Cal. 11.)

§ 671. **Where tenants in common.** It is the duty of the sheriff in the execution of a writ of assistance to place the purchaser on foreclosure of mortgage of an estate in common in the possession of every part and parcel of the land jointly with the other tenants in common. (*Tevis v. Hicks*, 38 Cal. 234.) In this case the sheriff found on going to the ranch of defendant that Mrs. Hicks, wife of defendant, held in her own right as her separate property an undivided interest in the whole rancho, derived from a source independent of her husband. In the opinion of the court "she was not liable, under any writ to which the applicant has shown himself entitled, to be ejected or removed from the rancho, or any portion thereof; but she, or any one in possession for her, was and is bound to admit the applicant to a joint and common possession and occupancy with her, not only of the house and two hundred acres surrounding the same, but of every part and parcel of the entire rancho."

§ 672. **Who not to be removed.** In the execution of the writ the sheriff cannot remove any of the

tenants in common who hold under a title derived from a source independent of him through whom the purchaser claims. (*Tevie v. Hicks*, 38 Cal. 234.)

§ 673. **Alias writ.** If the return to the first writ does not clearly declare that it has been fully executed, and it is made to appear by affidavits that it has not been, it is competent for the court to issue another writ. (*Tevie v. Hicks*, 38 Cal. 234.)

§ 674. **False return.** If the sheriff neglects or refuses to fully execute the writ, or makes a false return of his acts thereunder, he is liable to the party aggrieved for all accruing damages.

CHAPTER XXIV.

WRIT OF RESTITUTION.

- § 675. Requirements of the writ.
- § 676. Writ does not determine right of property.
- § 677. Whom the sheriff may dispossess.
- § 678. Who bound by judgment in ejectment.
- § 679. Whom the sheriff may not dispossess.
- § 680. Who may be removed.
- § 681. Notice of pending suit.
- § 682. Evasion of process.
- § 683. Colorable possession of land.
- § 684. Possession of third parties.
- § 685. When mandamus will issue.
- § 686. When forcible entry will not lie against sheriff.
- § 687. Must show right of occupancy.
- § 688. When sheriff may demand an indemnity bond.
- § 689. Error in writ.

§ 675. **Requirements of the writ.** The writ of restitution requires the officer to restore the plaintiff to possession of the premises described therein, and usually to make a money judgment due to plaintiff out of the property of the defendant. Under it the plaintiff is entitled to immediate possession of the premises and to the money judgment as soon as it can be made.

§ 676. **Writ does not determine right of property.** The writ of restitution obtained by the defendants in an action of forcible entry and detainer does not determine the right of property or the right of possession. It simply decides a restoration to immediate possession, which has been taken away by an illegal

and unwarranted ouster tending to produce a breach of the peace.

§ 677. **Whom the sheriff may dispossess.** "What parties can be dispossessed under a writ of *habere facias possessionem* under any and all circumstances, is not very clear upon authority. Some cases go so far as to hold that all persons who enter into possession after the commencement of the action, regardless of how or by what title they entered, must go out, upon the ground that otherwise there might be no end to litigation; while other cases seem to go no further than to hold that the defendant and those entering under or succeeding to him in the possession of the land only need go out, upon the ground that none are affected by the judgment except parties and privies, and that no one can be deprived of his property without first having been allowed his day in court; and we apprehend," say the court in the case of *Long v. Neville*, 29 Cal. 131, "that these two principles, which practically amount to the same thing, together furnish the true test for the solution of every case. . . . *Prima facie*, all who come into possession after action brought must go out, for the presumption is, nothing to the contrary appearing, that they came in under the defendant."

In this case it was held that it is the duty of the sheriff, having the writ of *habere facias possessionem*, to remove all persons who came upon the property after the suit was brought, except a person other than the defendant who is in possession under a title adverse to the defendant; and that where ejectment is brought against a tenant alone, and pending the action the landlord dispossesses him and leases to an-

other tenant who has no notice of the pendency of the action, it is the duty of the sheriff who receives the writ of *habere facias possessionem* to remove the second tenant.

Willis Long and W. B. Long commenced an action of ejectment against two persons named Hull, who were in the actual possession of the land at the time the action was brought. The Hulls were in possession as tenants of one Ellis, who attempted to intervene by petition, but the plaintiffs demurred, and the demurrer was sustained. The Hulls made default, and judgment was entered against them, and them only, for the possession of the land. Pending the action of ejectment, Ellis brought an action against the Hulls, obtained judgment, and dispossessed the Hulls. Afterwards Ellis leased the land to one Brown, who was in possession at the time the sheriff received the writ. The sheriff refused to execute the writ upon Brown. The supreme court held that Brown came in under the same title and held the same right to the possession which was held by the Hulls when the action was commenced against them, and that the sheriff could have lawfully dispossessed Brown, and having failed to do so, he made himself and his sureties liable. (*Long v. Neville*, 29 Cal. 131.)

§ 678. **Who bound by judgment in ejectment.** If a defendant in ejectment conveys the land pending litigation, and the grantee enters upon the land with or without notice of the pending suit, he is not only liable to be dispossessed by the writ of restitution, if the plaintiff obtains judgment, but is also bound by the judgment, as an instrument of evidence, to the

same extent as it would have been binding upon his grantor had no conveyance been made. (*Watson v. Dowling*, 26 Cal. 125.)

§ 679. **Whom the sheriff may not dispossess.**

A sheriff has no authority by virtue of a writ of restitution to remove from the premises described in the writ persons who were not parties nor privies to the judgment on which the writ was issued and did not enter by collusion with the defendant in the judgment pending the suit. (*Tevis v. Ellis*, 25 Cal. 515; *Archbishop v. Shipman*, 69 Cal. 586, 11 Pac. 343; *Irving v. Cunningham*, 77 Cal. 52, 18 Pac. 878.) Where the owner of certain real estate, who was not a party in the suit, was threatened by the sheriff with ejectment from his land, it was held that he was not entitled to an injunction against the sheriff. The plaintiff and his tenant were not only beyond the reach of the writ, but were unaffected by the judgment as an instrument of evidence, and therefore had nothing to fear from either; that if the sheriff interfered with the plaintiff's possession of the lots, the writ would not only fail as a justification, but would be pertinent to convict the sheriff of an act of official oppression. (*Tevis v. Ellis*, ante.)

In *Watson v. Dowling*, 26 Cal. 125, the court held that where several persons are owners of a tract of land as tenants in common, and the interest of one passes to a purchaser under execution sale, who brings ejectment against the execution debtor alone, and recovers judgment, neither the other tenants in common nor the grantees who purchase and enter upon the land pending the suit, can be dispossessed by the sheriff by virtue of the writ of restitution.

Parties in exclusive possession of land claiming adversely, at the commencement of an ejectment suit to which they were not made parties, are not affected by the judgment therein. (*McLeran v. McNamara*, 60 Cal. 610.)

A person in possession of the demanded premises at the time of the commencement of the action to recover possession cannot be removed under a writ issued on a judgment in the case unless he is made defendant and judgment is rendered against him after the court acquires jurisdiction of his person. (*Ford v. Doyle*, 37 Cal. 346.)

If neither the tenant nor his landlord are parties to an action of ejectment, and the landlord was in possession when the suit was commenced, but subsequently leased to the tenant, the tenant cannot rightfully be removed by a writ of restitution issued in such action. (*Calderwood v. Pyser*, 31 Cal. 333.)

One who after an action of ejectment has been commenced enters upon the demanded premises, but does not enter under the defendant, or by collusion with him, and is not made a party to the action, cannot be removed by virtue of a writ of restitution issued on a judgment rendered in the action. (*Mayo v. Sprout*, 45 Cal. 99.)

§ 680. **Who may be removed.** A party and her tenants coming into possession of lands, after an action brought to recover possession, under a prior unrecorded deed from two of the defendants in the action, of which plaintiff had no notice when the action was commenced, were properly dispossessed under a writ of restitution issued on a judgment for plaintiff in said action. (*Mayne v. Jones*, 34 Cal. 483.)

In the case of *Sampson v. Ohleyer*, 22 Cal. 200, pending an action of ejectment against a tenant, the latter transferred possession to his landlord, who had actual notice of and defended the suit, but was not made a party, and plaintiff recovered judgment; it was held that, under the writ of restitution authorized by the judgment, the landlord might be dispossessed and that in ejectment against the occupant of the premises, a judgment of recovery binds not only the defendant but all persons who receive possession of the premises from him with actual notice of the pending suit.

If the plaintiff in ejectment dies after a judgment in his favor has been rendered, a writ of restitution may be issued on the judgment at the instance and for the benefit of his successor in interest in the property. (*Franklin v. Merida*, 50 Cal. 289.)

Under a writ of possession against the husband, his wife should be dispossessed, her only holding being such as she had by virtue of her marital relations with the defendant in the writ. (*Huerstal v. Muir*, 64 Cal. 450, 2 Pac. 33.)

§ 681. **Notice of pending suit.** The twenty-seventh section of the Practice Act (*California. Code Civ. Proc., sec. 409*), relating to the filing of *lis pendens*, does not apply to actions of ejectment, but to proceedings in chancery, the purpose of which is to turn equitable estates into legal ones, or to enforce liens upon legal estates. (*Watson v. Dowling*, 26 Cal. 125.)

§ 682. **An evasion of process.** If the defendant, pending an action against him to recover possession

of land, colludes with another person to obtain judgment against him for possession, and to be placed in possession by a writ of restitution, such other person must go out under a writ of possession against the defendant. He will not be protected by his judgment if it was collusively obtained. (*Wetherbee v. Dunn*, 36 Cal. 147, 95 Am. Dec. 166.)

§ 683. **Colorable possession of land.** Where a defendant in ejectment has taken possession of land in collusion with the plaintiff for no other purpose than to afford such plaintiff a pretext to take possession under a writ of restitution, such pretended possession will be disregarded. (*South Beach L. Association v. Christy*, 41 Cal. 501.)

§ 684. **Possession of third parties.** If the plaintiff obtains judgment in an action of forcible entry and detainer, but does not obtain possession of the property, and a writ of restitution is not issued, and the judgment is afterwards reversed and the action dismissed, and during the pendency of the action third parties obtain possession of the property by collusion with a servant of the defendant, the defendant is not entitled to a writ to be restored to possession as against these third parties. (*Bowers v. Cherokee Bob*, 46 Cal. 280.)

§ 685. **When mandamus will issue.** In an action for a forcible and unlawful entry and detainer of a mine against a corporation and C and V, the jury returned a verdict of guilty as to C and V, and not guilty as to the corporation: *Held*, that such a verdict is conclusive that the plaintiff was peaceably in

actual possession of the premises at the time of the entry; that unlawful and forcible entry on his possession was made by the defendants, C and V, and that the corporation did not participate in the trespass. The peaceable and actual possession of the plaintiff is incompatible with the lawful possession of another; and such a verdict is conclusive against the possession of the corporation. (*Fremont v. Crippen*, 10 Cal. 211, 70 Am. Dec. 711.)

Where a writ of restitution has been awarded in such a case, and the sheriff refuses to execute the same, on the ground that the mine is in the possession of certain persons not parties to the suit, who claim to hold under the corporation, the court will award a peremptory *mandamus* against the sheriff to compel him to execute the writ.

To supersede the remedy by *mandamus*, a party must not only have a specific adequate legal remedy, but one competent to afford relief upon the very subject-matter of his application.

Neither a remedy by criminal prosecution, nor by action on the case for neglect of duty, will supersede that by *mandamus*, since it cannot compel a specific act to be done, and is, therefore, not equally convenient, beneficial, and effectual. (*Fremont v. Crippen*, 10 Cal. 212, 70 Am. Dec. 711.)

§ 686. **When forcible entry will not lie against sheriff.** An action under the act concerning forcible entries and unlawful detainers will not lie against a party who has been put in possession by a sheriff in good faith, by virtue of a writ of restitution, even if the person turned out, and who brings the action, was one whom the officer could not lawfully dis-

possess by virtue of the writ. (*Janson v. Brooks*, 29 Cal. 214.) Nor is the sheriff guilty of a forcible entry if acting in good faith therein.

§ 687. **Must show right of occupancy.** A person in possession of land where a writ of restitution is served is presumed to hold under the defendant in the action, and to avoid being dispossessed by the writ must show affirmatively that he holds by a right independent and paramount. (*Sampson v. Ohleyer*, 22 Cal. 200.)

§ 688. **When sheriff may demand an indemnity bond.** When a sheriff goes to execute a writ of possession issued on a judgment in an action to recover land, if he finds other parties in possession than those named in the complaint, who claim that they are rightfully in possession, not in privity with the defendants, and the circumstances are such that a reasonable doubt exists whether the sheriff has a right to turn them out, the sheriff may demand indemnity, and, unless it is given, may refuse to execute the writ. This is the law, even if the premises are specifically described in the writ. (*Long v. Neville*, 36 Cal. 455, 95 Am. Dec. 199.)

If a sheriff has wrongfully turned a person out of possession of land under a writ of restitution, he will be restored by the court to the possession, on motion made for that purpose. (*South Beach Land Assoc. v. Christy*, 41 Cal. 501; *Mayo v. Sprout*, 45 Cal. 99.)

§ 689. **Error in writ.** In an action of ejectment, if the execution correctly refers to a judgment in such manner as to identify it, it is sufficient to justify the

sheriff in enforcing it, even if it contains an error in reciting the day on which the judgment had been rendered. (*Franklin v. Merida*, 50 Cal. 289.)

CHAPTER XXV.

ARRESTS.

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- § 727. Refusing to arrest criminals.
- § 728. Justifiable homicide in making arrest.
- § 729. Arrests in disorderly houses.
- § 730. Carrying concealed weapons—Who is not a traveler.

§ 690. **Duty to arrest offenders.** It is the duty of the sheriff to arrest and take before the nearest magistrate for examination all persons who attempt to commit or who have committed a public offense. (*California. County Govt. Bill, sec. 93; Stats. 1893, p. 372.*)

§ 691. **Rights of officers to seizure in criminal cases.** It is not only the right, but the duty, of an officer making an arrest to take from the prisoner not only stolen goods, but any articles which may be of use as proof in the trial of the offense with which the prisoner is charged. (*Wharton's Criminal Pleading and Practice, secs. 60, 61.*) He may take from the prisoner any articles of property which it is presumable may furnish evidence against him. (1 *Bishop's New Criminal Procedure, sec. 210.*) This right of sequestration is plain, notwithstanding the property may be claimed by a third party; and stolen goods may be held as against the owner if necessary for use as evidence, however clear the title of the claimant may be. (*Ex parte Hurn, 92 Ala. 102, 25 Am. St. Rep. 23, 9 So. 515, 13 L. R. A. 120; Closson v. Morrison, 47 N. H. 482, 93 Am. Dec.*

459; *Commercial Exchange Bank v. McLeod*, 65 *Iowa*, 665, 54 *Am. Rep.* 36, 19 *N. W.* 329, 22 *N. W.* 919; *Woolfolk v. State*, 81 *Ga.* 551, 8 *S. E.* 724.)

In *Newberry v. Carpenter* the trial court ordered that a steam engine, boilers, and materials incident to an explosion, for which the engineer was arrested for manslaughter, be taken into the custody of the police department as evidence, and the supreme court decided that the order was without authority of law. Chief Justice McGrath dissented, and said, in part:

"The right of an officer to pursue a fleeing criminal in and upon any premises, and into any dwelling, does not depend upon the statute. There is no statute which authorizes an officer to take from a prisoner such evidence of guilt as may be found on the person—the bloody knife, the revolver with an empty chamber, garments stained with blood, the shoe or boot which fits the track, the coat with the missing button, the knife with the broken blade, the hat found at the scene of the crime. Such taking and use do not violate the rule that the prisoner shall not be compelled to furnish evidence against himself.

"The right to the possession and enjoyment of property must be subordinated to the law of overruling necessity. It is subject to the necessary burdens and restrictions imposed by the general police power of the state in order to secure the general comfort, health, security, and protection of the citizen. The limitations upon the police power and its execution do not embrace such reasonable judicial orders as may be found necessary in the course of the administration of the criminal law for the detention of witnesses and the preservation of evidence. Police officers must be given a reasonable latitude in the

pursuit of offenders, the detection of crime, and the collection of evidence; and the courts vested with jurisdiction to try such offenders must be allowed to exercise a reasonable discretion respecting the preservation of the evidence of crime in matters before them. The principle of the rule that permits the traveler upon the highway to go upon the abutting land when the highway is impassable; that permits entry upon any premises in case of fire, and the destruction of any property if deemed necessary to stay the conflagration; that permits the inspector to enter any close,—extends to measures necessary for the prevention of crime, the detection, pursuit, and arrest of offenders, and the preservation of criminating evidence. All are matters not alone of individual interest, but of public concern.”

§ 692. **Arrest without warrant.** A sheriff or any other peace officer may, with or without a warrant, arrest a person under the following conditions:—

“1. For a public offense committed or attempted in his presence.

“2. When a person arrested has committed a felony, although not in his presence.

“3. When a felony has, in fact, been committed, and he has reasonable cause for believing the person arrested to have committed it.

“4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.

“5. At night, when there is reasonable cause to believe that he has committed a felony.” (*California. Pen. Code, sec. 836.*)

§ 693. **When warrant must be shown.** “If the person making the arrest is acting under the au-

thority of a warrant, he must show the warrant, if required." (*California. Pen. Code, sec. 842.*)

§ 694. **Officer making arrest may summon aid—Posse comitatus.** An officer, or any person making an arrest, may orally summon as many persons as he deems necessary to aid him therein. (*California. Pen. Code, sec. 150.*)

§ 695. **Refusing to aid officers.** "Every male person above eighteen years of age who neglects or refuses to join the *posse comitatus* or power of the county, by neglecting or refusing to aid and assist in taking or arresting any person against whom there may be issued any process, or by neglecting to aid and assist in retaking any person who, after being arrested or confined, may have escaped from such arrest or imprisonment, or by neglecting or refusing to aid and assist in preventing any breach of the peace, or the commission of any criminal offense, being thereto lawfully required by any sheriff, deputy sheriff, coroner, constable, judge or justice of the peace or other officer concerned in the administration of justice, is punishable by fine of not less than fifty nor more than one thousand dollars." (*California. Pen. Code, sec. 150.*)

§ 696. **How arrest is made.** "The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or is pursued immediately after its commission, or after an escape." (*California. Pen Code, sec. 841.*)

§ 697. **Breaking outer door to make arrest.** A sheriff or other officer authorized to execute criminal process may lawfully break open the door of the house wherein the person dwells whose personal arrest is directed by the writ, and enter and search the dwelling to find the offender; and if hindered or obstructed by other persons in his attempt to make such entrance and search, they would be guilty of the offense for which the defendants in this case have been indicted, although at the time of such attempted entry and search and obstruction the accused party may not have been in the dwelling, and though therefore such entry and search may not have been necessary to make the arrest. The right to break open the outer door to make the entrance, of course, includes the right to break open the doors of the different rooms and chambers in the house to make a thorough search throughout the premises; and though the defendant in the process be not found or shown to be in the place of his dwelling at the time, yet such entrance and search of the officer, having valid criminal process in his hands, would not therefore be unlawful, or make him a trespasser; but to obstruct the officer in such case would be unlawful, and the parties making the obstruction would subject themselves therefor to indictment and punishment according to law. (6 *Bac. Abr.*, 1 *Am. Ed.* 171; *Hawkins v. Commonwealth* (Ky. Ct. of App.), 14 *B. Monroe*, 395, 61 *Am. Dec.* 147.)

§ 697a. **When demand for entrance necessary.** It is true that with civil instead of criminal process in his hands, whether the state or a private person be the plaintiff in the writ, and though it authorize

the arrest of the defendant, the sheriff cannot break open the outer door of his dwelling without first having requested the door to be opened, and at the same time disclosing the purpose of his request; but the rule is different with regard to criminal or penal process requiring the capture and arrest of the alleged offender. The fact that the house entered and searched is, at the time, the place of the dwelling of the defendant in the writ gives sufficient warrant to the sheriff, though it be not known to him certainly whether the offender be or not then in the house or be found therein, and the law does not require that the officer should first signify his business and demand admission before entering and searching, for such disclosure of his purpose and demand of entrance would in many cases defeat the very object in view, by giving the offender notice of his danger and an opportunity of effecting his escape. (*Hawkins v. Commonwealth* (Ky. Ct. of App.), 14 B. Monroe, 395, 61 Am. Dec. 147.)

§ 698. **When force may be used.** "When the arrest is being made, by an officer under the authority of a warrant, after information of the intention to make the arrest, if the person to be arrested either flees or forcibly resists, the officer may use all necessary means to effect the arrest." (*California. Pen. Code, sec. 843.*)

§ 699. **When doors may be broken.** "To make the arrest, a private person, if the offense be a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable

grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired." (*California. Pen. Code, sec. 844.*)

§ 700. **Use of unnecessary force.** An officer who, in making a lawful arrest, uses excessive and unnecessary force, is liable upon his official bond for damages thereby caused to the person arrested. In *Towle v. Matheus et al.*, 130 Cal. 574, 62 Pac. 1064, in an action against the constable of Wilmington Township, Los Angeles County, and his bondsmen to recover damages for injuring the person of plaintiff while arresting him, the trial was by the court without a jury and plaintiff had judgment, from which defendants appealed. The arrest was made in the town of San Pedro, and the court found that at the time "plaintiff was willfully and maliciously disturbing the peace and quiet of the neighborhood," etc.; that in order "to stop his disturbance," the constable, defendant Matheus, and his deputy, one Mathews, seized hold of the plaintiff and placed iron nippers or handcuffs on plaintiff's wrists; that when they attempted to arrest plaintiff "he violently and with force resisted said arrest," and in order to make the arrest the constable called upon the bystanders to assist him and his deputy, and several persons responded to the call and gave their assistance; "that the plaintiff struck said Matheus in the face with his fist, whereupon said Matheus then violently struck plaintiff over the head with a pistol covered with a scabbard, thereby cutting plaintiff's scalp and caused it to bleed profusely, and the said Mathews, deputy, drew his pistol

and willfully shot plaintiff in the back. That said Matheus and Mathews, assisted by other persons, took plaintiff to the city jail." The arrest was made for a breach of the peace committed in the sight of the officers and without a warrant, and at the time plaintiff was a stranger to the constable and his deputy, and whatever was done by the officer was "by virtue of and under color of their said offices." The court further found, that while making said arrest, the defendants used more force than was necessary. The wound inflicted by the pistol was severe, and disabled plaintiff from pursuing his occupation for some time. The supreme court sustained the lower court.

§ 701. **Taking weapons from prisoners.** "Any person making an arrest may take from the person arrested all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken." (*California. Pen. Code, sec. 846.*)

The instruments, devices, or tokens used in the commission of a crime are competent and legitimate evidence in the trial of the accused, and the taking of them from his person by an officer who has arrested him upon a charge of having committed the crime is not an illegal seizure; nor is the search of his person for such instruments an unreasonable search within the meaning of the constitutional provision against unreasonable search. (*State v. Edwards, 51 W. Va. 220, 41 S. E. 429, 59 L. R. A. 465.*)

§ 702. **When arrest may be made at night.** "If the offense charged is a felony, the arrest may be

made on any day, and any time of the day or night.”
(*California. Pen. Code, sec. 840.*)

§ 703. **When arrest cannot be made at night.** If it is a misdemeanor, the arrest cannot be made at night, unless upon the direction of the magistrate, indorsed upon the warrant, except when the offense is committed in the presence of the arresting officer.
(*California. Pen. Code, sec. 840.*)

§ 704. **Nighttime defined.** The phrase “night-time,” as used herein, means the period between sunset and sunrise. (*California. Pol. Code, sec. 3260.*)

§ 705. **Name of defendant in warrant.** “The warrant must specify the name of the defendant, or, if it is unknown to the magistrate, the defendant may be designated therein by any name.” (*California. Pen. Code, sec. 815.*)

§ 706. **How executed in another county.** If the defendant is in another county than that in which the warrant is issued, it may be served therein upon the written direction of a magistrate of the county in which it is to be served, indorsed upon the warrant, signed by him, with his name of office, and dated at the county, city or town where it is made, to the following effect: “This warrant may be executed in the county of ——” (naming the county). Such indorsement “cannot, however, be made, unless the warrant be accompanied with a certificate of the clerk of the county where it was issued, under seal, as to the official character of the magistrate; or

unless upon the oath of a credible witness, in writing, indorsed on or annexed to the warrant, proving the handwriting of the magistrate by whom it was issued." (*California. Pen. Code, secs. 819, 820.*)

§ 707. **Rescuing prisoners.** Every person who rescues or attempts to rescue, or aids another person in rescuing or attempting to rescue, any prisoner from any officer or person having him in lawful custody, is punishable under section 101 of the Penal Code of California. But one who, without violence, assists a person who is confined without authority or process of law to depart from his place of confinement, is not guilty of the crime of assisting a prisoner to escape. (*People v. Ah Teung, 92 Cal. 421, 28 Pac. 577, 15 L. R. A. 421.*)

§ 708. **Taking prisoner before magistrate.** "If the offense charged is a felony, the officer making the arrest must take the defendant before the magistrate who issued the warrant, or some other magistrate of the same county." (*California. Pen. Code, sec. 821.*)

"If the offense charged is a misdemeanor, and the defendant is arrested in another county, the officer must, upon being required by the defendant, take him before a magistrate in that county, who must admit the defendant to bail, and take bail from him accordingly." (*California. Pen. Code, sec. 822.*)

"On taking the bail, the magistrate must certify that fact on the warrant, and deliver the warrant and undertaking of bail to the officer having charge of the defendant. The officer must then discharge the defendant from arrest, and must, without delay, de-

liver the warrant and undertaking to the clerk of the court at which the defendant is required to appear.” (*California. Pen. Code, sec. 823.*)

“If, on the admission of the defendant to bail, the bail is not forthwith given, the officer must take the defendant before the magistrate who issued the warrant, or, in case of his absence or inability to act, before the nearest or most accessible magistrate in the same county, and must at the same time deliver to the magistrate the warrant, with his return thereon indorsed and subscribed by him.” “The defendant must in all cases be taken before the magistrate without unnecessary delay.” (*California. Pen. Code, secs. 824, 825.*)

§ 709. **Liability for delay.** “Every public officer or other person, having arrested any person on a criminal charge, who willfully delays to take such person before a magistrate having jurisdiction, to take his examination, is guilty of a misdemeanor.” (*California. Pen. Code, sec. 145.*)

§ 710. **Proceedings before magistrate.** “If the defendant is brought before a magistrate other than the one who issued the warrant, the depositions on which the warrant was granted must be sent to that magistrate, or, if they cannot be procured, the prosecutor and his witnesses must be summoned to give their testimony anew.” (*California. Pen. Code, sec. 826.*)

§ 711. **Offense triable in another county.** “When an information is laid before a magistrate of the commission of a public offense triable in another

county of the state, but showing that the defendant is in the county where the information is laid, . . . the warrant must require the defendant to be taken before the nearest or most accessible magistrate of the county in which the offense is triable, and the depositions of the informant or prosecutor, and of the witnesses who may have been produced, must be delivered by the magistrate to the officer to whom the warrant is delivered." The officer must then take the defendant and the papers to such magistrate, with his return indorsed on the warrant. If the offense in such case is a misdemeanor, the officer must, if the defendant require it, take him before the magistrate of the county in which the warrant was issued, who must admit him to bail. (*California. Pen. Code, secs. 827-829.*)

§ 712. **Retaking after escape.** If a person arrested escape, or is rescued, the officer may immediately pursue and retake him at any time and any place within the state. To retake an escaped prisoner, the officer pursuing may break open an outer or inner door or window, if, after notice of his intention, he is refused admittance. (*California. Pen. Code, secs. 854, 855.*) If the prisoner escape into another state, the officer cannot retake him except upon a requisition from the governor of the state from which he escaped.

§ 713. **Jurisdiction of offenses.** When a public offense is committed on the boundary of two or more counties in California or within five hundred yards thereof, the jurisdiction is in either county. When an offense is committed "on board a vessel navigat-

ing a river, bay, slough, lake, or canal, or lying therein, in the prosecution of her voyage, the jurisdiction is in any county through which the vessel is navigated in the course of her voyage, or in the county where the voyage terminates; and when the offense is committed in this state, on a railroad train or car prosecuting its trip, the jurisdiction is in any county through which the train or car passes in the course of her trip, or in the county where the trip terminates. When the offense, either of bigamy or incest, is committed in one county and the defendant is apprehended in another, the jurisdiction is in either county. When property taken in one county by burglary, robbery, larceny, or embezzlement, has been brought into another, the jurisdiction of the offense is in either county; but if, at any time before the conviction of the defendant in the latter, he is indicted in the former county, the sheriff of the latter county must, upon demand, deliver him to the former." The jurisdiction on violation of the law relating to prize-fights is in any county in which any act is done toward the commission of the offense, into, out of, or through which the offender passed to commit the offense, or where the offender is arrested. (*California. Pen. Code, secs. 782, 783, 785, 786, 795.*)

§ 714. **Arrest in civil actions.** Arrest in civil actions is treated in this work in the chapter on "Arrest and Bail," *ante*.

§ 715. **Duty on arresting insane person.** It is the duty of the sheriff, immediately upon arresting any person charged with being insane, to notify the dis-

trict attorney of the county in which the arrest is made. (*California. Stats.* 1889, *p.* 329.)

§ 716. **Arrest for contempt of court.** When a party to a divorce case is ordered imprisoned for contempt in failing to pay alimony, the sheriff cannot place the person under arrest until the commitment has been placed in his hands.

§ 717. **Arrest by telegraph.** "A justice of the supreme court, or a judge of a superior court, may, by an indorsement under his hand upon a warrant of arrest, authorize the service thereof by telegraph, and thereafter a telegraphic copy of such warrant may be sent by telegraph to one or more peace officers, and such copy is as effectual in the hands of any officer, and he must proceed in the same manner under it as though he held an original warrant issued by the magistrate making the indorsement."

"Every officer causing telegraphic copies of warrants to be sent, must certify as correct, and file in the telegraph office from which such copies are sent, a copy of the warrant and indorsement thereon, and must return the original with a statement of his action thereunder." (*California. Pen. Code, secs.* 850, 851.)

§ 718. **Electors—When privileged from arrest.** "Electors are privileged from arrest, except for an indictable offense, during their attendance on the election, and in going to and returning from the same." (*California. Pol. Code, sec.* 1069; *Constitution, art. II, sec. 2. See, also, sec.* 162, *ante.*)

§ 719. **The legislature—Exemption from arrest.** “Members of the legislature shall, in all cases except treason, felony and breach of the peace, be privileged from arrest, and they shall not be subject to any civil process during the session of the legislature, nor for fifteen days next before the commencement and after the termination of each session.” (*California. Constitution, art IV, sec. 2. See, also, sec. 162, ante.*)

§ 720. **Militia exemptions from arrest.** “No person belonging to the military forces is subject to arrest on civil process while going to, remaining at, or returning from, any place at which he may be required to attend for military duty.” (*California. Pol. Code; sec. 2093.*) “No person shall be imprisoned for a militia fine in time of peace.” (*California. Constitution, art. I, sec. 15. See, also, sec. 162, ante.*)

§ 721. **Exemption of witnesses from arrest.** “Every person who has been, in good faith, served with a subpœna to attend as a witness before a court, judge, commissioner, referee or other person, in a case where the disobedience of the witness may be punished as a contempt, is exonerated from arrest in a civil action while going to the place of attendance, necessarily remaining there and returning therefrom.” (*California. Code Civ. Proc., sec. 2067. See, also, sec. 162, ante.*)

§ 722. **Arrest for fraud and torts, etc.** “No person can be arrested for debt in any civil action, on mesne or final process, except in cases of fraud, nor in civil actions for torts, except in cases of willful injury to persons or property.” (*California. Constitution, art. I, sec. 15.*)

§ 723. **Prisoners brought from other counties as witnesses.** In California, when it is necessary to have a person imprisoned in the state prison brought before any court, or a person imprisoned in a county jail brought before a court sitting in another county, an order for that purpose may be made by the court and executed by the sheriff of the county where it is made; or his deposition may be taken. (*Pen. Code, secs. 1333, 1346.*)

§ 724. **When prisoner may not be handcuffed.** By the common law, a prisoner is entitled to appear for trial, upon his own plea of not guilty, free from all manner of shackles or bonds, unless there is danger of his escape. (*People v. Harrington, 42 Cal. 165, 10 Am. Rep. 296.*)

The mere fact that a prisoner brought before the examining magistrate remains handcuffed during the proceedings, and in that condition waives a preliminary examination, will not support a plea in abatement to the information of the offense. (*State v. Lewis, 19 Kan. 260, 27 Am. Rep. 113.*) A different rule is laid down in the California Reports. In *People v. Harrington, 42 Cal. 165, 10 Am. Rep. 296*, the court observed: "In my opinion, any order or action of the court, which without evident necessity imposes physical burdens, pains, and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense; and especially would such physical bonds and restraints in like manner materially impair and prejudicially affect his statutory privilege of becoming a

competent witness and testifying in his own behalf.” The judgment was reversed on account of the prisoner’s being tried in shackles, in spite of his request to be unshackled.

§ 725. **Service of bench warrant.** The bench warrant, for the arrest of a person under indictment or presentment, may be served in any county, and need not be indorsed by a magistrate of that county. When the offense is not punishable with death, the officer must, if required, take the defendant before a magistrate in the county in which it is issued, or in which he is arrested, for the purpose of giving bail. But if the offense is punishable with death, the officer must deliver him into custody, according to the command of the bench warrant. (*California. Pen. Code, secs. 934-936, 979-986, 1195-1199.*)

For arrest after presentment in California, see sections 935, 936, 979-986 of the Penal Code; and for arrest after judgment, sections 1197-1199 of the Penal Code.

§ 726. **Making arrests, etc., without authority.** “Every public officer, or person pretending to be a public officer, who, under the pretense or color of any process or other legal authority, arrests any person or detains him against his will, or seizes or levies upon any property, or dispossesses any one of any lands or tenements, without a regular process or other lawful authority therefor, is guilty of a misdemeanor.” (*California. Pen. Code, sec. 146.*)

§ 727. **Refusing to arrest criminals.** “Every sheriff, coroner, keeper of a jail, constable or other

peace officer, who willfully refuses to receive or arrest any person charged with a criminal offense, is punishable by fine not exceeding five thousand dollars, and imprisonment in the county jail not exceeding five years." (*California. Pen. Code, sec. 142.*)

An officer, nevertheless, should be guarded as to receiving persons as prisoners without a warrant or commitment.

§ 728. **Justifiable homicide in making an arrest.** Homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance, when necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest. (*California. Pen. Code, sec. 196.*)

§ 729. **Arrests in disorderly houses.** Every person who keeps any disorderly house, or any house for the purpose of assignation or prostitution, or any house of public resort, by which the peace, comfort, or decency of the immediate neighborhood is habitually disturbed, or who keeps any inn in a disorderly manner, and every person who lets any apartment or tenement, knowing that it is to be used for the purpose of assignation or prostitution, is guilty of a misdemeanor. (*California. Pen. Code, sec. 316.*)

A house, the inmates of which behave so badly as to become a nuisance to the neighborhood, is esteemed at common law a disorderly house, and so of one which is kept in such a way as to disturb or scandalize the public generally, or the inhabitants of a

particular neighborhood, or the passers-by. (2 *Wharton's Criminal Law*, 7th ed., sec. 2392; 5 *Am. & Eng. Ency. of Law*, 693; *State v. Wilson*, 93 N. C. 608.) And it seems that a complaint for keeping such a house may be maintained by proof that only one person in the neighborhood or community was disturbed or annoyed, if the acts done were of such a nature as tended to annoy all good citizens. (*Commonwealth v. Hopkins*, 133 Mass. 381, 43 *Am. Rep.* 527.)

A city council has power to pass such an ordinance, and a police officer, who from the outside of a house hears a disturbance, or is made aware of disorderly conduct within it, may, acting in good faith, enter the house and lawfully arrest the person guilty of such conduct, as being an inmate of a disorderly house, for the offense may be fairly said to have been committed in his presence. (*Hawkins v. Sutton*, 95 *Wis.* 492, 60 *Am. St. Rep.* 131, 70 *N. W.* 483.)

§ 730. **Carrying concealed weapons — Who is not a traveler.** The supreme court of Indiana, in *State v. Smith* (Oct. 9, 1901), 157 *Ind.* 241, 87 *Am. St. Rep.* 205, 61 *N. E.* 566, has decided that a person going from his home by rail to a town fifteen miles distant in an adjoining county to attend a political meeting, having no other business, and returning home from such meeting, is not engaged in travel outside ordinary habits, business, or duties, and at such a distance from home as takes him beyond the circle of his acquaintance, among strangers, with whose habits and character he is not familiar, and hence is not a "traveler" under (statute) punishing the carrying of such weapons by others than "trav-

elers." The court said: "The evil sought to be remedied by said section was the insecurity of life caused by the pernicious habit of carrying concealed weapons, and the consequent demoralization of society. The word 'traveler,' when used in a broad sense, designates one who travels in any way, distance not being material. It is clear that the legislature did not use the word in this sense, for such signification would destroy the very purpose for which the section was enacted, by licensing, rather than suppressing, the practice of carrying concealed weapons. It is evident, therefore, that the word was employed in a more limited sense, and was intended to designate a person traveling at least such a distance as takes him among strangers, with whose habits, conduct, and character he is not acquainted, where unknown dangers may exist from which there may be a necessity to protect himself by preparing for a defense against an attack. It is therefore evident that appellant was not a traveler within the meaning of said section."

One may be guilty of carrying a concealed weapon while on his own premises. (*Carroll v. State*, 28 *Ark.* 99, 18 *Am. Rep.* 538.) Neither by the letter nor by the spirit of the statute prohibiting the carrying of weapons concealed about the person is any exception created in favor of place. One of the objects of the law is the avoidance of bad influences which the wearing of a concealed deadly weapon may exert upon the wearer himself, and which in that way, as well as by the weapon's obscured convenience for use, may tend to the insecurity of other persons. (*Owens v. State*, 31 *Ala.* 387; *State v. Reid*, 1 *Ala.* 612, 35 *Am. Dec.* 44.)

The mental suggestions which proceed from constant contact with weapons specially adapted to, and usually worn for the purpose of, inflicting bodily harm to persons may come as well when the wearer is in his domicile as elsewhere. The only matter relied on to acquit the defendant is that he was in his home when carrying the pistol concealed upon his person, and that until the time of his arrest he was alone. This neither avoids the operation of the statute nor excuses its violation. (*Harmon v. State*, 69 *Ala.* 248; *Dunston v. State*, 124 *Ala.* 89, 82 *Am. St. Rep.* 152, 27 *So.* 333.)

Appellant was convicted of carrying brass knuckles, and the court declared its knowledge judicially that brass knuckles may be composed of metal other than brass, as steel, iron, etc., and that when the information charged "brass knuckles" it was equivalent to an allegation that they were made of metal or a hard substance. (*Louis v. State*, 36 *Tex. Crim. Rep.* 52, 61 *Am. St. Rep.* 832, 35 *S. W.* 377.)

CHAPTER XXVI.

HABEAS CORPUS.

- § 731. Receipt of writ.
- § 732. Service of the writ.
- § 733. Manner of service.
- § 734. The return.
- § 735. Certificate of service by sheriff.
- § 736. Prisoner held by United States court.
- § 737. Warrant may issue instead of writ.
- § 738. Service on holidays.
- § 739. No fees chargeable.

§ 731. **Receipt of writ.** Upon receipt by the sheriff of a writ of *habeas corpus* to be served by him, and directed to another person, the officer should indorse upon it the time of its reception and make and retain a copy of the writ. Under the California practice, if it is directed to the sheriff or other ministerial officer of the court out of which it issues, it must be delivered by the clerk to such officer without delay, as other writs are delivered for service; if it is directed to any other person, it must be delivered to the sheriff for service. (*California. Pen. Code, sec. 1478.*)

§ 732. **Service of the writ.** If the writ be placed in the hands of the sheriff for service upon another person, it must be by him "served upon such person by delivering the same to him without delay. If the person to whom the writ is directed cannot be found, or refuses admittance to the officer or person serving or delivering such writ, it may be served or delivered by leaving it at the residence of the person

to whom it is directed, or by affixing it to some conspicuous place on the outside either of his dwelling house or of the place where the party is confined or under restraint." (*California. Pen. Code, sec. 1478. See, also, the next section.*)

§ 733. **Manner of service.** In the absence of statutory provision as to the manner of service of the writ, as in most of the Pacific states, there is a diversity of opinion among attorneys and officers as to the manner in which this writ should be served—whether service should be made with the original writ or a copy thereof. Section 1478 of the Penal Code of California seems to require the service to be made with the original writ; and section 1479 gives weight to this construction by providing that, if the person to whom the writ is directed refuses after service to obey the same, the court or judge, *upon affidavit* (not upon any return of the officer who served the writ), must issue an attachment against such person, etc. Under the old common-law practice, the original writ of *habeas corpus* was served upon the person to whom it was directed. The same practice is followed in the state of New York, the codes of which state were closely followed by the code commissioners of California in codifying the laws of this state. In Utah and Oregon the statute expressly requires delivery of the original writ.

§ 734. **The return.** "The person upon whom the writ is served, must state in his return, plainly and unequivocally:—

"1. Whether he has or has not the party in his custody, or under his power or restraint.

"2. If he has the party in his custody or power, or under his restraint, he must state the authority and cause of such imprisonment or restraint.

"3. If the party is detained by virtue of any writ, warrant, or other written authority, a copy thereof must be annexed to the return, and the original produced and exhibited to the court or judge on the hearing of such return." (*California. Pen. Code, sec. 1480.*)

No writ of *habeas corpus* can be disobeyed for defect in form. (*Pen. Code, sec. 1495.*)

§ 735. **Certificate of service by sheriff.** Section 1480 of the Penal Code of California commands that "the person upon whom the writ is served must state in his return," etc. The statute contemplates but one return, and that is of the person to whom the writ is directed. When the writ is served by the sheriff upon another person, a record of the service by the officer should be made in the court from which the writ issued, so that parties interested in the proceeding need not be compelled to seek the officer in person to ascertain if service had been made. To this end a certificate of service may be made by the officer, and filed with the clerk of the court, upon a copy of the writ. Such certificate may be in the following form:—

In the Matter of the Application of }
 JOHN DOE }
 For a Writ of *Habeas Corpus*. }

State of California, }
 County of } ss.

I hereby certify that on
 the day of, 19.., I served the writ of *habeas*

corpus issued in the above entitled matter (a copy of which is hereto annexed) upon the said by delivering said writ to him personally at said county of

Dated [Signed]
 Sheriff of County.

§ 736. **Prisoner held by United States court.** A state judge or court has no jurisdiction to issue a writ of *habeas corpus*, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of the authority, of the United States by an officer of that government. When it is made known to the state court that the prisoner is held by virtue of an order of a court of the United States, the writ should be discharged. (*Ableman v. Booth*, 21 How. (U. S.) 506, 16 L. Ed. 169; *Tarble's Case*, 13 Wall. (U. S.) 397, 20 L. Ed. 597.) In such a case the sheriff should not bring the prisoner into court under the writ, but should make his return to the writ showing the facts. (*For form of return, see sec. 855, post.*)

§ 737. **Warrant may issue instead of writ.** When it appears that there is reason to believe that the person detained will be carried out of the jurisdiction of the court or judge, a warrant may be issued (instead of writ of *habeas corpus*) directed to the sheriff, coroner, or constable, commanding the officer to take the person held in custody, confinement or restraint, and forthwith bring him before such court or judge. A command may also be inserted in the warrant for the apprehension of the person charged with such illegal detention and restraint. (*California. Pen. Code, secs. 1497, 1498.*)

§ 738. **Service on holidays.** Statutory provision is usually made for the issuance and service of the writ of *habeas corpus* on any day or at any time. (*California. Pen. Code, sec. 1502.*)

§ 739. **No fees chargeable.** Usually no fees are to be charged in *habeas corpus* cases, mention being either omitted in the respective fee bills or express provision being made prohibiting the collection of fees. (*California. Pen. Code, sec. 4333; County Govt. Bill, sec. 228.*)

CHAPTER XXVII.

FUGITIVES FROM JUSTICE.

- § 740. Fugitives from justice, generally.
- § 741. When extradition may be had.
- § 742. Proceedings for requisition.
- § 743. Forms of application.
- § 744. Arrest of fugitive for extradition.
- § 745. Expense of extradition.
- § 746. Requisites for obtaining requisition.
- § 747. No fee for procuring extradition papers.

§ 740. **Fugitives from justice, generally.** Section 2 of article IV of the Constitution of the United States provides that "a person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." Pursuant to these provisions, the several states have enacted statutes prescribing the procedure for the arrest and surrender of such criminals within the boundaries of the state and for the institution of proceedings to bring back criminals who have fled to other states. (*California. Pen. Code, secs. 1547-1558; Pol. Code, sec. 380.*)

§ 741. **When extradition may be had.** In order that the arrest and delivery of the fugitive may be had, there must be actually pending against him in the state making the demand a charge of criminality in the form of an indictment, information, affidavit,

or other accusation authorized by the laws of the state. (*People v. Brady*, 56 N. Y. 182; *Ex parte Smith*, 3 McLean, 121, Fed. Cas. No. 12968; *Ex parte White*, 49 Cal. 434.) The affidavit upon which the requisition issues need not set forth the crime charged with all legal exactness (*Matter of Manchester*, 5 Cal. 237); neither is it necessary that a copy of the indictment shall accompany the demand (*Nichols v. Cornelius*, 7 Ind. 611); but the requisition or proceeding must show that the crime was committed within the jurisdiction of the state making the application, and that the criminal has fled from justice and taken refuge in another state. (*Ex parte Smith*, 3 McLean, 121, Fed. Cas. No. 12968.)

§ 742. **Proceedings for requisition.** A person who flees from justice to another state may be brought back upon a requisition upon the governor of the state to which the fugitive has escaped. To obtain such requisition application must be made to the governor of the state from which the criminal has fled, accompanied with an affidavit of the person making the application, setting forth the name of the fugitive, the crime with which he is charged or has been convicted, and the present whereabouts of the fugitive, together with an exemplified copy of the indictment found or other judicial proceedings had against him in the state in which he is charged to have committed the offense. All papers thus forwarded must be in duplicate. The application for a requisition should request the appointment of some person (naming him) as a suitable person to receive and bring back the fugitive. Care should be taken to see that the proper certificate is made out, signed

by the district attorney in accordance with section 746, *post*, and forwarded with the other papers to the governor.

§ 743. **Forms of application.** Forms of affidavit and request for requisition are given in the chapter on "Forms" (*see chapter XXXII, secs. 893, 894, post*), and may be varied so as to conform to the particular proceeding under which the fugitive is sought to be arrested.

§ 744. **Arrest of fugitive for extradition.** A fugitive from another state may be committed by the magistrate to the proper custody in the county for a reasonable time, to enable the arrest of the fugitive under the warrant of the governor on the requisition of the governor of the state in which the crime was committed. The accounts of the person employed in bringing back such fugitive must be audited by the state board of examiners and paid out of the state treasury. The proceedings for the arrest and commitment are, in all respects, similar to those provided for the arrest and commitment of a person charged with any public offense committed in the state, except that usually, as in California, an exemplified copy of an indictment or other judicial proceedings may be received as evidence before the magistrate. (*California. Pen. Code, secs. 1548-1550, 1557.*)

§ 745. **Expense of extradition.** The expense of bringing back fugitives from justice is borne by the state to which they are returned for trial, and statutory provision is usually made for the auditing of the bills therefor.

§ 746. **Requisites for obtaining requisition.** The following are the rules of practice adopted by a conference of the representatives of the different states upon the subject of requisitions. All requisitions directed to the governor should conform to the same:

“The application for the requisition must be made or recommended by the district attorney for the county in which the offense was committed, and must be in duplicate original papers, or certified copies thereof.

“The following must appear by the certificate of the district attorney:—

“(a) The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be properly spelled, in roman capital letters; for example, JOHN DOE.

“(b) That in his opinion the ends of public justice require that the alleged criminal be brought to this state for trial at the public expense.

“(c) That he believes he has sufficient evidence to secure the conviction of the fugitive.

“(d) That the person named as agent is a proper person, and that he has no private interest in the arrest of the fugitive.

“(e) If there has been any former application for a requisition for the same person, growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be.

“(f) If the fugitive is known to be under either civil or criminal arrest in the state or territory to

which he is alleged to have fled, the fact of such arrest and the nature of the proceedings on which it is based must be stated.

“(g) That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever, and that if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.

“(h) The nature of the crime charged, with a reference, when practicable, to the particular statute defining and punishing the same.

“(i) If the offense charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application.

“1. In all cases of fraud, false pretenses, embezzlement or forgery, when made a crime by the common law, or any penal code or statute, the affidavit of the principal complaining witness or informant that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and will not, directly or indirectly, use the same for any of said purposes, shall be required, or a sufficient reason be given for the absence of such affidavit.

“2. Proof by affidavit of *facts and circumstances* satisfying the executive that the alleged criminal has fled from the justice of the state, and is in the state on whose executive the demand is requested to be made, must be given. The fact that the alleged criminal was in the state where the alleged crime was committed at the time of the commission thereof, and is

found in the state upon which the requisition was made, shall be sufficient evidence, in the absence of other proof, that he is a fugitive from justice.

“3. If an indictment has been found, certified copies, in duplicate, must accompany the application.

“4. If an indictment has not been found by a grand jury, the *facts and circumstances* showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by affidavits taken before a *magistrate* (a notary public is not a magistrate within the meaning of the statutes), and that a warrant has been issued, and duplicate certified copies of the same, together with the returns thereto, if any, must be furnished upon an application.

“5. The official character of the officer taking the affidavits or depositions and of the officer who issued the warrant must be duly certified.

“6. Upon the renewal of an application (for example: on the ground that the fugitive has fled to another state, not having been found in the state on which the first was granted), new or certified copies of papers in conformity with the above rules must be furnished.

“7. In the case of any person who has been convicted of any crime, and escapes after conviction, or while serving his sentence, the application may be made by the jailer, sheriff or other officer having him in custody, and shall be accompanied by certified copies of the indictment or information, record of conviction and sentence, upon which the person is held, with the affidavit of such person having him in custody, showing such escape, with the circumstances attending the same.

“8. No requisition will be made for the extradition of any fugitive except in compliance with these rules.”

§ 747. **No fee for procuring extradition papers.** “No compensation, fee, or reward of any kind can be paid to or received by a public officer of this state, or other person, for a service rendered in procuring from the governor the demand mentioned in the last section, or the surrender of the fugitive, or for conveying him to this state, or detaining him therein, except as provided for in such section.” Any person violating any of these provisions is guilty of a misdemeanor. (*California. Pen. Code, secs. 144, 1558.*)

CHAPTER XXVIII.

REWARDS.

- § 748. Offer of reward binding.
- § 749. Essentials for recovery.
- § 750. When reward is not earned.
- § 751. Recovery by deputy sheriff—Public policy.
- § 752. Information not the same as capture.
- § 753. When officer not entitled to reward.

§ 748. **Offer of reward binding** An agreement by one who has lost property by fire or theft to pay a certain sum to any one who will secure the arrest and conviction of the criminal is not a *nude pact*, but may be enforced by a person performing the service.

In such cases the offer of a reward or compensation by public advertisement, either to a particular person or class of persons, or to any and all persons, is a conditional promise; and if any one to whom such offer is made shall perform the service before the offer is revoked, such performance is a good consideration, and the offer becomes a legal and binding contract. Until the performance the offer may be revoked at pleasure.

Such advertisements, upon acceptance of their terms and performance of the services, become written contracts. (*Ryer v. Stockwell*, 14 Cal. 134, 73 Am. Dec. 634; *McLeod v. Meade*, 77 Cal. 87, 19 Pac. 189.)

§ 749. **Essentials for recovery.** To entitle a person to recover a reward he must show that he knew

the reward was offered, and that he acted in reference to it, and in faith of getting it. (*Hewitt v. Anderson*, 56 Cal. 476, 38 Am. Rep. 65.)

§ 750. **When reward is not earned.** An offer by a party who has been robbed, of a reward for the arrest and conviction of the robbers is not earned by one who merely communicates to the party robbed his suspicions that a certain person is guilty, with a statement that others were satisfied of his guilt, and that circumstances pointed strongly towards him, and who does not claim the reward until after the arrest and conviction of the robbers. (*Burke v. Wells, Fargo & Co.*, 50 Cal. 218.)

Where the reward was for such information as would lead to the arrest and conviction of the criminal, there could be no claim for the money until trial and conviction. The statute of limitations begins to run from that time, and the limitation would be the same as on a written contract. (*Ryer v. Stockwell*, 14 Cal. 134, 73 Am. Dec. 634.)

§ 751. **Recovery by deputy sheriff—Public policy.** An agreement to compensate a deputy sheriff for procuring evidence to convict for a crime committed in another county is not contrary to public policy and may be enforced. (*Harris v. Moore*, 70 Cal. 502, 11 Pac. 780.)

§ 752. **Information not the same as capture.** One is not entitled to a reward for the "capture" of a thief simply because he has informed an officer where the thief can be found, although the officer goes at once and makes an arrest. A reward offered for a "cap-

ture" is not a reward offered for information. (*Everman v. Hyman*, 26 *Ind. App.* 165, 28 *N. E.* 1022, 84 *Am. St. Rep.* 284.)

§ 753. **When officer not entitled to reward.** A sheriff, whose fees or salary are fixed by law, and whose duty it is to arrest a guilty person within his jurisdiction, cannot recover a reward offered therefor, though he made extra exertions and incurred expenses not covered by the legal fees or salary he was authorized to charge. In *McLeer v. Colgan*, 120 *Cal.* 262, 52 *Pac.* 502, where a captain of police of the city and county of San Francisco apprehended a murderer in such city and county for a murder committed in another county, it was held that the captain made the arrest of the murderer in the line of his official duty, and that it was against sound public policy to receive a reward offered by the government of the state for the arrest and conviction of the murderer; and in that case the court say: "The courts, both in this country and in England, are practically unanimous in declaring that a public officer, working for a fixed compensation, or whose fees are prescribed by law, cannot demand or contract for a reward for services rendered in the line or scope of his official duty."

The offer of a reward for the arrest and conviction of the person or persons who committed a designated crime is complied with and the reward earned by obtaining and giving to some interested person sufficient information in relation to the perpetrator of the crime and his whereabouts as to authorize and secure the arrest of the offender; and subsequently to procure his conviction by a court of competent jurisdiction.

Hence, it is no defense to an action for such reward that the plaintiff did not arrest the criminal, if plaintiff discovered facts and circumstances tending strongly to inculcate the person who thereupon, being confronted with the charge by the plaintiff, made a full confession of his guilt, and afterward pleaded guilty to the indictment found against him. (*Haskell v. Davidson*, 91 Me. 488, 64 Am. St. Rep. 254, 40 Atl. 330, 42 L. R. A. 155.)

CHAPTER XXIX.

SEARCH WARRANTS.

- § 754. Search warrant, generally.
- § 755. How served.
- § 756. By whom served.
- § 757. Time for return.
- § 758. Service by day or night.
- § 759. Receipt for property taken.
- § 760. Search of person—Lottery tickets.
- § 761. Disposition of property in search warrant.
- § 762. Any peace officer may serve search warrants anywhere in his county.

§ 754. **Search warrant, generally.** A search warrant is an order in writing in the name of the people, signed by a magistrate, directed to a peace officer, commanding him to forthwith search the person or place named for the property specified, and to bring it before the magistrate. (*California. Pen. Code, sec. 1523.*)

§ 755. **How served.** In serving a search warrant "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance. He may break open doors and windows for the purpose of liberating a person who, having entered to aid him, is detained therein, or when necessary for his own liberation." (*California. Pen. Code, secs. 1531, 1532.*)

§ 756. **By whom served.** It may in all cases be served by any sheriff, constable, marshal, or policeman, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution. (*California. Pen. Code, sec. 1530.*)

§ 757. **Time for return.** "A search warrant must be executed and returned to the magistrate who issued it within ten days after its date; after the expiration of this time, the warrant, unless executed, is void." (*California. Pen. Code, sec. 1534.*)

§ 758. **Service by day or night.** The magistrate issuing a search warrant must insert a direction therein "that it be served in the daytime, unless the affidavits are positive that the property is on the person or in the place to be searched, in which case he may insert a direction that it be served at any time of the day or night." (*California. Pen. Code, sec. 1533.*)

§ 759. **Receipt for property taken.** The officer must give a receipt for the property taken to the person in whose possession it was found, and file with the return an inventory of the property taken. (*California. Pen. Code, sec. 1535.*)

§ 760. **Search of person—Lottery tickets.** The legislature has power to authorize the issuance of a warrant to search the person of an individual in a proper case. In California such power has been exercised by the enactment of sections 1523. to 1542 of the Penal Code.

Under a warrant authorizing the searching of a certain person for lottery tickets the officer was justi-

fied in carrying away tickets discovered in the room where the search was made for the purpose of using them as evidence. After the tickets are no longer required as evidence, the owner is not entitled to have them returned to him, in a suit against a police officer having them, as they are in law not in his custody but in that of the magistrate to whom they were taken under the search warrant. (*Collins v. Lean*, 68 Cal. 284, 9 Pac. 173.)

§ 761. **Disposition of property in search warrant.** Section 1536 of the California Penal Code provides that when the property is delivered to the magistrate he must, if it was stolen or embezzled, or if it was taken on a warrant issued on the grounds stated in the fourth subdivision of section 1524 of the Penal Code, dispose of it as provided in sections 1408 and 1413. If it was taken on a warrant issued on the grounds stated in the second and third subdivisions of section 1524, he must retain it in his possession, subject to the order of the court to which he is required to return the proceedings before him, or of any other court in which the offense in respect to which the property taken is triable.

§ 762. **Any peace officer may serve search warrants anywhere in his county.** Section 1529 of the California Political Code requires that a search warrant shall be directed to "any sheriff, constable, marshal, or policeman in the county." It must be issued by a magistrate. (*Pen. Code, sec. 1523.*) A magistrate is defined by section 807 as "an officer having power to issue a warrant for the arrest of a person charged with a public offense"; and section 808 enumerates the following persons as magistrates:

The justices of the supreme court, the judges of the superior courts, justices of the peace, police magistrates in towns or cities. In *Omeara v. Merritt*, 128 Mich. 249, 87 N. W. 197, the court held that jurisdiction of a police court of a city to issue a search warrant extends throughout the county, and continues: "The important question in the case is, Was the police judge authorized to issue a search warrant that might be served anywhere in the county of Kent? The plaintiff says no, but fails to find any authority upon the question. The act creating the police court is silent upon the subject of search warrants. In Howard's Annotated Statutes, section 6591d, is found a statement of the power of the police court. Among other powers conferred upon the judge is, 'He shall also have all the powers and authority of a justice of the peace except in the trial of civil cases.' Compiled Laws, section 11986, confers upon any magistrate authorized to issue warrants in criminal cases, upon proper complaint being made, authority to issue search warrants. Compiled Laws, section 11988, requires that all search warrants shall be directed to the sheriff or any constable of the county. That the police judge is a magistrate authorized to issue warrants in criminal cases is not open to question. This being so, he has the authority, upon proper complaint being made, to issue search warrants, which shall be directed as commanded by the statute. The form of the complaint to be made in these cases found in the fourth edition of Tiffany's Criminal Law, 357, indicates that the learned author understood that for property stolen in the city of Adrian and concealed in a dwelling house outside of said city a search warrant might be issued, and such has been the under-

standing of lawyers. In this case the complaint showed the larceny of a wheel in the city of Grand Rapids and reasonable cause to believe it was concealed in the house of plaintiff in Byron. This gave the magistrate authority to issue the warrant, and the warrant, being in due and legal form, was a complete protection to the officer."

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CHAPTER XXX.

COUNTY JAIL.

- § 763. Jail, by whom kept and for what use.
- § 764. Rooms required in jails.
- § 765. Searching of cells, etc.
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§ 763. **Jail, by whom kept and for what used.**
The common jails in the several counties of the state are kept by the sheriffs of the counties in which they are respectively situated, and are used for the detention of all persons lawfully committed thereto. (*California. Pen. Code, sec. 1597.*)

The sheriffs of counties of the first, second, third, and fourth classes are authorized by section 4226 of the Statutes of 1907, p. 414, to appoint an official matron of the several county jails therein, to have free access at all reasonable times to the immediate presence of all female prisoners.

§ 764. **Rooms required in jails.** "Each county jail must contain a sufficient number of rooms to allow all persons belonging to either one of the following classes to be confined separately and distinctly from persons belonging to either of the other classes: (1) Persons committed on criminal process and detained for trial; (2) persons already convicted of crime and held under sentence; (3) persons detained as witnesses or held under civil process, or under an order imposing punishment for a contempt; (4) males separately from females." (*California. Pen. Code, sec. 1598.*)

§ 765. **Searching of cells, etc.** All cells should be frequently searched, and mattresses and bedding thoroughly overhauled, for contraband articles. Saws, files, and even ropes are easily smuggled into a jail, despite the watchfulness of its keepers. There is no criminal so hardened in crime but that he has sympathizers who are ever ready to aid him to regain his liberty. With the more desperate classes it is a constant study of how to escape from confinement. With such prisoners the jailer must exercise constant vigilance or allow himself to be outwitted.

§ 766. **Prisoners to be classified.** "Persons committed on criminal process and detained for trial,

persons convicted and under sentence, and persons committed upon civil process, must not be kept or put in the same room, nor shall male and female prisoners (except husband and wife) be kept or put in the same room." (*California. Pen. Code, sec. 1599.*)

§ 767. **Prisoners must be confined.** "A prisoner committed to the county jail for trial or for examination, or upon conviction for a public offense, must be actually confined in the county jail until he is legally discharged; and if he is permitted to go at large out of the jail, except by virtue of a legal order or process, it is an escape." (*California. Pen. Code, sec. 1600.*)

§ 768. **United States prisoners.** "The sheriff must receive, and keep in the county jail, any prisoner committed thereto by process or order issued under the authority of the United States, until he is discharged according to law, as if he had been committed under process issued under the authority of this state; provision being made by the United States for the support of such prisoner." The sheriff is answerable for such prisoner's safe keeping in the courts of the United States according to the laws thereof. (*California. Pen. Code, secs. 1601, 1602.*)

§ 769. **Unsafe jail.** Section 1603 of the Penal Code provides that when there is no jail in the county or when the jail becomes unfit or unsafe for the confinement of prisoners the judge of the superior court may, by a written order filed with the county clerk, designate the jail of a contiguous county for the con-

finement of the prisoners of his county, or of any of them, and may at any time modify or vacate such order. Section 1605 provides for the revocation of such order.

§ 769a. **Photographing prisoners.** If in his discretion a sheriff deems it necessary to the prevention of the escape of an accused person to take the prisoner's photograph and to ascertain his height, weight, and other physical peculiarities, and his name, residence, place of birth, etc., he may do so without incurring liability on his official bond therefor, his acts being without personal violence to the prisoner.

A sheriff does not act officially in sending photographs of an accused person, with descriptions of such person, to various individuals and police departments, whereby the accused is held out to the world as a criminal; and the sheriff and his sureties are not liable on his official bond for such acts, though the officer may be amenable to a libel suit. (*State ex rel. Bruns v. Clausmier*, 57 N. E. 541.)

In the case of the *State ex rel. Bruns v. Clausmeier et al.* the supreme court of Indiana, in a decision filed May 29, 1900, says: "It is the duty of a sheriff to confine in jail and safely keep all persons in his custody, awaiting trial on a charge of crime, until lawfully discharged, and, if they escape, to pursue and recapture them. A sheriff, in making an arrest for a felony on a warrant, has the right to exercise a discretion, not only as to the means taken to apprehend the person named in the warrant, but also as to the means necessary to keep him safe and secure after such apprehension until lawfully discharged; and he has the right to take such steps and adopt

such measures as, in his discretion, may appear to be necessary to the identification and recapture of persons in his custody if they escape. Unless this discretion is abused through malice, wantonness, or a reckless disregard for, and a selfish indifference to, the common dictates of humanity, the officer is not liable. (*Firestone v. Rice*, 71 Mich. 377, 15 Am. St. Rep. 266, 38 N. W. 885; *Diers v. Mallon*, 46 Neb. 121, 50 Am. St. Rep. 598, 64 N. W. 722.) It is the duty of the said officer to search the person and take from him all money or other articles that may be used as evidence against him at the trial. (*Rusher v. State*, 94 Ga. 363, 21 S. E. 593, 47 Am. St. Rep. 175, and note on page 180.) And he may take from him any dangerous weapons, or anything else that said officer may, in his discretion, deem necessary to his own or the public safety, or for the safe keeping of the prisoner, and to prevent his escape; and such property, whether goods or money, he holds subject to the order of the court." (*Closson v. Morrison*, 47 N. H. 482, 93 Am. Dec. 459; *Commercial Exchange Bank v. McLeod*, 65 Iowa, 665, 19 N. W. 329, 22 N. W. 919, 54 Am. Rep. 36; *Reifsnnyder v. Lee*, 44 Iowa, 101, 21 Am. Rep. 733; *Holker v. Hennessy*, 141 Mo. 527, 540, 42 S. W. 1090, 64 Am. St. Rep. 524, 532, and note p. 537, 39 L. R. A. 165; *Gillett Crim. Law* (2d ed.), sec. 158.) In *Closson v. Morrison*, *supra*, it was held that said officer might not only take any deadly weapon he might find on the person, but also money or other articles of value found upon the person, though not connected with the crime for which he was arrested, and could not be used as evidence on the trial thereof, by means of which, if left in his possession, he might procure his

escape, or obtain tools, implements, or weapons with which to effect his escape. It would seem, therefore, if, in the discretion of the sheriff, he should deem it necessary to the safe keeping of a prisoner and to prevent his escape, or to enable him the more readily to retake the prisoner if he should escape, to take his photograph and a measurement of his height, and ascertain his weight, name, residence, place of birth, occupation, and the color of his eyes, hair and beard, as was done in this case, he could lawfully do so. The complaint does not charge that any physical force was used to induce the relator to have his negative taken, or to furnish the sheriff the information above mentioned not obtainable by observation. It is evident that the substantial cause of action set forth in the complaint is an alleged libel of the relator by the appellee Clausmeier, in the publication of said pictures and the writing on the back thereof, by sending the same to the police department of Fort Wayne and to divers persons to the relator unknown. Conceding, without deciding, that if a sheriff commit an assault and battery upon a person in his custody, or fails to use ordinary care to protect him against acts of violence from others, he and his sureties are liable on his official bond to such person therefor, yet it does not follow that a sheriff and his sureties are liable on his official bond for libelous words published by said sheriff of and concerning a person in his custody. If a sheriff have a person in his custody on a charge of crime, and orally or in writing uses language concerning said person which is slanderous or libelous *per se*, while he may be liable to an action therefor, there is no liability on his official bond on account thereof. A person who is a sheriff,

in speaking or writing such language under such circumstances, is not guilty of any misfeasance or nonfeasance as such officer. He is neither performing an official duty in a proper or improper manner, nor doing any act whatever as an officer. It is evident that said Clausmeier, in sending said photographs with the writing on the backs thereof, was not acting either *virtute officii* or *colore officii*. Under such circumstances there is no liability on an official bond. (*State v. Givan*, 45 Ind. 267; *State v. Kent*, 53 Ind. 112.)

§ 770. **Removal in case of fire.** "When a county jail or a building contiguous to it is on fire, and there is reason to apprehend that the prisoners may be injured or endangered, the sheriff or jailer must remove them to a safe and convenient place, and there confine them as long as it may be necessary to avoid the danger." (*California. Pen. Code, sec. 1607.*)

§ 771. **Removal in case of pestilence.** When a pestilence or contagious disease breaks out in or near a jail, and the physician thereof certifies that it is liable to endanger the health of the prisoners, the sheriff may remove the prisoners upon an order of the superior judge. (*California. Pen. Code, sec. 1608.*)

§ 772. **Service of papers on prisoners.** "A sheriff or jailer upon whom a paper in a judicial proceeding, directed to a prisoner in his custody, is served, must forthwith deliver it to the prisoner, with a note thereon of the time of its service. For a neglect

to do so he is liable to the prisoner for all damages occasioned thereby." (*California. Pen. Code, sec. 1609.*)

§ 773. **Guard for jail.** "The sheriff, when necessary, may, with the assent in writing of the superior court judge, or, in a city, of the mayor thereof, employ a temporary guard for the protection of the county jail, or for the safe keeping of prisoners, the expenses of which are a county charge." (*California. Pen. Code, sec. 1610.*)

§ 774. **Sheriff must receive all persons committed.** "The sheriff must receive all persons committed to jail by competent authority, and provide them with necessary food, clothing and bedding, for which he shall be allowed a reasonable compensation, to be determined by the board of supervisors." (*California. Pen. Code, sec. 1611.*)

§ 775. **Prisoners on civil process.** "Whenever a person is committed upon process in a civil action or proceeding, except when the people of this state are a party thereto, the sheriff is not bound to receive such person, unless security is given on the part of the party at whose instance the process is issued, by a deposit of money to meet the expenses for him of necessary food, clothing and bedding, or to detain such person any longer than these expenses are provided for. This section does not apply to cases where a party is committed as a punishment for disobedience to the mandates, process, writs or orders of court." (*California. Pen. Code, sec. 1612.*)

§ 776. **Expense of boarding prisoners.** The board of supervisors shall allow to the sheriff his necessary expenses for boarding prisoners at the county jail, and shall fix the price at which they shall be boarded, except when otherwise provided by law. (*California. County Govt. Bill, secs. 216, 230; Stats. 1893, pp. 507, 511.*)

When the statute allows to the sheriff for feeding the prisoners "a reasonable compensation, to be determined by the board of supervisors" (*California. Pen. Code, sec. 1611*), action by the supervisors does not preclude the officer from bringing suit against the county in case he is dissatisfied with the amount allowed by the board. (*Fulkerth v. County of Stanislaus, 67 Cal. 334, 7 Pac. 754.*)

§ 777. **Working of prisoners.**—"Persons confined in the county jail under a judgment of imprisonment rendered in a criminal action or proceeding, may be required by an order of the board of supervisors to perform labor on the public works or ways in the county." (*California. Pen. Code, sec. 1613.*)

§ 778. **Custody of prisoners while working.** Under two statutes, one requiring that the sheriff must "take charge of and keep the county jail and the prisoners therein," and the other authorizing the working of prisoners upon public roads, "under the direction of some responsible person," the sheriff cannot refuse to turn over prisoners to the overseer appointed by the supervisors under the latter act on the ground that he is their only legal custodian. (*Hicks v. Folks, 97 Cal. 241, 32 Pac. 8.*)

§ 779. **Officer refusing to receive criminals.** "Every sheriff, coroner, keeper of a jail, constable, or other peace officer, who willfully refuses to receive or arrest any person charged with a criminal offense, is punishable by fine not exceeding five thousand dollars, and imprisonment in the county jail not exceeding five years." (*California. Pen. Code, sec. 142.*)

§ 780. **Prisoner entitled to visits of counsel.** The defendant must in all cases be taken before the magistrate without unnecessary delay, and after such arrest any attorney at law entitled to practice in the courts of record of California may at the request of the prisoner or any relative of such prisoner visit the person so arrested. Any officer having charge of the prisoner so arrested who willfully refuses or neglects to allow such attorney to visit a prisoner is guilty of a misdemeanor. Any officer having a prisoner in charge who refuses to allow an attorney to visit the prisoner when proper application is made therefor shall forfeit and pay to the party aggrieved the sum of five hundred dollars, to be recovered by action in any court of competent jurisdiction. (*Pen. Code, sec. 825; Stats. 1907, p. 888.*)

§ 781. **Rescuing prisoners.** "Every person who rescues or attempts to rescue, or aids another person in rescuing or attempting to rescue, any prisoner from any prison, or from any officer or person having him in lawful custody," is punishable under section 101 of the Penal Code of California.

§ 782. **Escapes from jail.** "Every prisoner confined in any other prison than a state prison, who

escapes or attempts to escape therefrom is guilty of a misdemeanor." (*California. Pen. Code, sec. 107.*)

"Every keeper of a prison, sheriff, deputy sheriff, constable, or jailer, or person employed as a guard, who fraudulently contrives, procures, aids, connives at, or voluntarily permits the escape of any prisoner in custody, is punishable by imprisonment in the state prison not exceeding ten years, and fine not exceeding ten thousand dollars." (*California. Pen. Code, sec. 108.*)

Every person who willfully assists any prisoner confined in any prison or in the lawful custody of any officer or prison to escape, or in an attempt to escape, from such prison or custody, is punishable by imprisonment in the state prison not exceeding ten years, and fine not exceeding ten thousand dollars. (*California. Pen. Code, sec. 109.*)

§ 783. **Escape—Computation of term.** An unauthorized release or departure of a prisoner without discharge in due course of law is, in effect, a technical escape, and the time of his absence cannot be computed as any part of the term of imprisonment. (*Ex parte Vance, 90 Cal. 208, 27 Pac. 209, 13 L. R. A. 574.*)

§ 784. **Credits allowable to prisoners.** By the provisions of section 1614 of the Penal Code of California, as amended in 1893, "for each month in which the prisoner appears, by the record, to have given a cheerful and willing obedience to the rules and regulations, and that his conduct is reported by the officer in charge of the jail to be positively good, five days shall, with the consent of the board of supervisors, be deducted from his term of sentence."

§ 785. **Inhumanity to prisoners.** "Every officer who is guilty of willful inhumanity or oppression toward any prisoner under his care or in his custody, is punishable by fine not exceeding two thousand dollars, and by removal from office." (*California. Pen. Code, sec. 147.*)

§ 786. **Carrying articles to prisoners.** Every person who carries or sends into a prison anything useful to aid a prisoner in making his escape, with intent thereby to facilitate the escape of any prisoner confined therein, is punishable by imprisonment in the state prison not exceeding ten years and fine not exceeding ten thousand dollars. (*California. Pen. Code, secs. 108-110.*)

§ 787. **Injuring jails.** "Every person who willfully and intentionally breaks down, pulls down, or otherwise destroys or injures any public jail or other place of confinement, is punishable by fine not exceeding ten thousand dollars, and by imprisonment in the state prison not exceeding five years." (*California. Pen. Code, sec. 606.*)

CHAPTER XXXI.

FEEES AND SALARIES.

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- § 813. Allowance of claims against the county.
- § 814. No fees in habeas corpus cases.

§ 788. **Fees and salaries, generally.** The various statutes regulating fees chargeable by and salaries allowed to sheriffs and constables in the states and territories to which this work is particularly appli-

cable are so numerous that even a reference to the statutes applicable to the several counties—much less the quoting of them at length—is precluded by the necessary limitations upon such a work as the present. In some states, as in California, a different fee bill exists for nearly every county; an equal diversity is found in the salary list, and both are the subject of frequent legislative change. Every officer, however, is presumed to be familiar with the fee bill of his own county, and, in each case, the officer will find the appropriate statute easily accessible.

§ 789. **Salaries of deputies.** Where the sheriff is allowed by law a salary in gross for all services rendered by him and his deputies in performing the official duties of sheriff, as in California, he may of course make his own terms as to the salaries to be paid to his deputies, except as to salaries of additional deputies, fixed by law and payable out of the county treasury.

For a reference to the statutory authority for additional deputies in California see “Index to Laws of California,” title “Sheriff-Deputies.”

§ 790. **Deputies for new courts.** When additional deputies are appointed, as authorized upon increase of the number of superior judges, the salary of each deputy is \$125 per month. (*California. Statutes* 1893, p. 507.)

§ 791. **Must require prepayment of fees.** The sheriff is not to perform any official services, except in cases of *habeas corpus*, unless upon the prepayment of the fees prescribed for such services; and on such

payment he must perform the services required. (*California. County Govt. Bill, sec. 223; Stats. 1893, p. 510.*)

The statute which declares that "any officer may refuse to perform any services in a civil action or proceeding, until the fee for such service is paid" is not to be construed as prohibiting the officer from performing the service without prepayment of fees, but as permissive merely, leaving the alternatives of cash in advance or credit to his own election. If, when services are demanded of an officer, he fails to demand his fees in advance, his obligation to perform the duty required is the same as it would be if the fees were prepaid or tendered in advance. (*Lick v. Madden, 25 Cal. 202.*)

§ 792. **Receipt for fees to be given.** Upon receiving any fees for official duty or service, the sheriff "may be required by the person paying the same to make out in writing, and deliver to such person, a particular account of such fees, specifying for what they respectively accrued, and shall receipt the same; and if he refuse or neglect to do so when required, he shall be liable to the party paying in treble the amount so paid." (*California. County Govt. Bill, sec. 224, Stats. 1893, p. 510.*)

§ 793. **Fee book to be kept.** The sheriff "must keep a fee book, open to public inspection during office hours, in which must be entered, at once and in detail, all fees or compensation of whatever nature, kind or description, collected or chargeable. On the first Monday of each and every month, he must add up each column in his book to the first day of the

month, and set down the totals. On the expiration of his term, he must deliver all fee books kept by him to the county auditor." (*California. County Govt. Bill, sec. 218; Stats. 1893, p. 509.*)

§ 794. **Prepayment of expense of publication.** "When, by law, any publication is required to be made by an officer, of any suit, process, notice, order or other paper, the costs of the same shall be first tendered by the party, if demanded, for whom such order of publication was granted, before the officer shall be compelled to make such publication." (*California. Stats. 1869-1870, p. 180, sec. 37.*)

§ 795. **Mileage—How computed.** When the statute allows to the officer certain mileage "for every mile necessarily traveled, *in going only*, in executing any warrant of arrest, subpœna or venire, . . . taking prisoners before a magistrate," the execution of the warrant of arrest and the taking before a magistrate are "separate and distinct acts to be done by the officer," and he is entitled to mileage both ways. (*Cunningham v. San Joaquin County, 49 Cal. 323; Allen v. Napa County, 82 Cal. 187, 23 Pac. 43; Nelson v. Breen, 98 Cal. 245, 33 Pac. 85.*)

§ 796. **Keeper's fees to be allowed.** When the statute provides, as in California, that "for his trouble and expense in taking and keeping possession of and preserving property under attachment or execution or other process," the sheriff shall be entitled to "such sum as the court may order; *provided* that no more than two dollars *per diem* shall be allowed to a keeper," the sheriff is not entitled to any fees for such

services unless the court makes an order allowing them. (*Shumway v. Leakey*, 73 Cal. 260, 14 Pac. 841. See, also, secs. 251, 252, ante.)

The sheriff is entitled to collect for his expenses in keeping property under levy only for such period as the property was lawfully in his possession. (*Sam Yuen v. McMann*, 99 Cal. 497, 34 Pac. 80.)

§ 797. **Officer's lien for fees.** A statute which provides that the officer may retain attached property until his fees are paid in effect gives him a lien for their amount, which he may enforce "in any suitable mode." (*Perrin v. McMann*, 97 Cal. 52, 31 Pac. 837.)

§ 798. **Change of sheriffs — Fees on release.** When a sheriff goes out of office holding attached property in his possession, the party wishing to procure a release must seek him and pay his fees in full up to the time of the release. (*Perrin v. McMann*, 97 Cal. 52, 31 Pac. 837.)

§ 799. **Fees of coroner or elisor.** "Whenever process is executed or any act performed by a coroner or elisor, in the cases provided by law in that behalf, he shall be entitled to a reasonable compensation, to be fixed by the court." (*California. County Govt. Act, sec. 109; Stats. 1893, p. 374.*)

§ 800. **Fees of citizen for service.** When summons or subpœna is served in California by a person other than the sheriff, under authority of the statute, such person shall be allowed such sum as the court may think proper, not exceeding the amount allowed sheriffs by law. (*Stats. 1891, p. 56.*)

§ 801. **Penalty for receiving illegal fees.** “Every executive or ministerial officer who knowingly asks or receives any emolument, gratuity, or reward, or any promise thereof, excepting such as may be authorized by law, for doing any official act, is guilty of a misdemeanor.” (*California. Pen. Code, sec. 70.*)

The board of supervisors, upon receiving a certified copy of the record of conviction of an officer for receiving illegal fees, must declare his office vacant. (*California. County Govt. Bill, sec. 226; Stats. 1893, p. 510.*)

§ 802. **Settlement before drawing salary.** In California the sheriff is not entitled to, and the auditor must not draw his warrant for, monthly salary until he has produced the certificate of the county treasurer showing that he has paid into the treasury the fees allowed by law for the preceding month, except such fees as are a charge against the county, accompanied by a statement of the aggregate amount thereof, as shown by the fee book, duly verified by him by his affidavit in the form prescribed by law. (*California. County Govt. Bill, secs. 217, 219, 222; Stats. 1893, pp. 508-510.*)

§ 803. **Division of county—Salaries.** “When the population of any existing county shall have been reduced, by reason of the creation of any new county from the territory thereof, below the class and rank first assumed, . . . the salary of county officers, the salaries of their deputies, clerks or assistants, and the number of such deputies, clerks or assistants, shall in no way be affected by reason of such division of the county or order of the board of supervisors for the

term for which they were elected and shall have qualified. . . . In all newly created counties, for the purpose of fixing the salaries and fees of county and township officers, the board of commissioners appointed to organize said new county, and if no commissioners be appointed, then the board of supervisors of said new county, shall classify said new county.” (*California. County Govt. Bill, sec. 235; Stats. 1893, p. 512.*)

§ 804. **Salary during erroneous suspension.** Provision is sometimes made by statute for the removal of public officers for willfull misconduct. (*Stats. 1893, p. 510.*) After judgment of removal and reversal of the same on appeal, the officer is entitled to his salary during the time of his suspension by the erroneous judgment, even though another person has been paid for performing the duties of the office in the mean time. (*Ward v. Marshall, 96 Cal. 155, 31 Am. St. Rep. 198, 30 Pac. 1113.*)

§ 805. **Conveying prisoners and insane persons.** The sheriff is entitled “to receive and retain for his own use five dollars *per diem* for conveying prisoners to and from the state prisons and for conveying persons to and from the insane asylums or other state institutions, also all expenses necessarily incurred in conveying insane persons to and from insane asylums, and in conveying persons to and from the state prisons, which *per diem* and expenses shall be allowed by the board of examiners and collected from the state.” (*California. Stats. 1893, p. 507; Stats. 1889, p. 200.*)

When the salary of the sheriff is fixed by law, "in full compensation for all services rendered," etc., and he is required to pay into the county treasury all "fees . . . of whatever kind or nature," a statute allowing him, out of the state treasury, expenses and *per diem* for transportation of prisoners and insane persons does not authorize him to appropriate such sums to his own use in addition to his salary unless expressly authorized. (*Santa Clara County v. Branham*, 77 Cal. 592, 20 Pac. 75.) Since the decision in this case the California statute has been amended as above stated, so as to allow all such sums to the sheriff "for his own use."

§ 806. **Sheriff entitled to salvage.** "Sheriffs and all persons employed by them, or aiding in the recovery and preservation of wrecked property, are entitled to a reasonable allowance as salvage for their services, and to all expenses incurred by them in the performance of such services, out of the property saved; and the officer having the custody of such property must detain it until the same are paid or tendered. But the whole salvage claimed must not exceed one half of the value of the property or proceeds on which it is charged; and every agreement, order, or adjustment allowing a greater salvage is void, unless ordered and allowed by the county judge." (*California. Pol. Code, sec. 2404.*)

§ 807. **Expenses in pursuit of criminals.** "The board of supervisors shall allow to the sheriff his necessary expense for pursuing criminals or transacting any criminal business without the boundaries of his county." (*California. Stats. 1893, p. 507.*)

§ 808. **No mileage for unsuccessful pursuit.** Under a statute fixing the mileage of the sheriff in criminal cases and providing that the supervisors shall allow him "his necessary expenses for pursuing criminals," he is not entitled to collect mileage for the distance traveled in an unsuccessful search for persons charged with crime, although the persons are subsequently found and arrested by him upon a second search, "though possibly he might rightly claim pay for his necessary expenses." (*Overall v. Tulare County*, 100 Cal. 61, 34 Pac. 519.)

§ 809. **Increase of compensation during term.** Article II, section 9 of the constitution of California provides that "the compensation of any county, city, town or municipal officer shall not be increased after his election, or during his term of office"; but by this provision it is only the compensation for services to be rendered, and not traveling and other incidental expenses of the office, that are forbidden to be raised. (*Kirkwood v. Soto*, 87 Cal. 394, 25 Pac. 488.)

§ 810. **Salaries of constables not to be fixed by supervisors.** A constitutional provision for the regulation by the legislature of the compensation of officers therein named is mandatory, and such regulation cannot be delegated to the board of supervisors, *e. g.*, the fixing of the salaries of constables in California. (*People ex rel. Atkinson v. Johnson*, 95 Cal. 471, 31 Pac. 611.)

§ 811. **Bill against county to be itemized.** "The board of supervisors must not hear or consider any claim in favor of any person, corporation, company

or association against the county, nor shall the board credit or allow any claim or bill against the county or district fund, unless the same be itemized, giving names, dates and particular services rendered; character of process served; upon whom; distance traveled; where and when; character of work done; number of days engaged; materials furnished; to whom; and quantity and price paid therefor, duly verified as to its correctness, and that the amount claimed is justly due, is presented and filed with the clerk of the board within a year after the last item of the account or claim accrued." (*California. County Govt. Bill, sec. 41; Stats. 1893, p. 363.*)

§ 812. **Fraudulent bills against county.** If the sheriff present to the board of supervisors any false or fraudulent claim, bill, account, voucher, or writing, he is guilty of a felony. (*California. Pen. Code, sec. 72.*)

§ 813. **Allowance of claims against the county.** All accounts of the sheriff for services performed by him and chargeable against the county must be presented to and allowed by the board of supervisors in the same manner as other claims. (*California. Stats. 1893, p. 511.*)

§ 814. **No fees in habeas corpus cases.** It is usually provided by statute that no fees are to be collected for the service of any process in *habeas corpus*, or no provision is made in the respective fee bills for the collection of any fees. (*California. Pen. Code, sec. 4333.*)

CHAPTER XXXII.

SHERIFFS' AND CONSTABLES' FORMS.

NOTE.—These forms are adapted to the practice in California. In other states care should be taken to make such changes as may be necessary to conform them to the local statutes. A full list and index of these forms will be found at the end of this volume.

§ 815. **Return on summons — One defendant.** (*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify that I received the within summons on the day of, 19.., and personally served the same upon John Doe, the within named defendant, by delivering to and leaving with said defendant, personally, in the County of, on the day of, 19.., a copy of said summons, attached to a copy of the complaint referred to in said summons.

Dated, 19..

., Sheriff,

By, Deputy Sheriff.

Sheriff's Fees, \$. . . .

NOTE.—Although the language of the statute does not in express terms declare that the copy of summons delivered to a defendant must be left with him, yet it is obvious that the spirit of the law would be violated if the copy were immediately taken from the defendant by the person making the service; and it is therefore deemed best that the return of service should show that not only the letter of the law, but its intent, has been complied with.

§ 816. **Return on summons—Several defendants.**
(*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify that I received the within summons on the day of, 19.., and personally served the same upon the hereinafter named defendants by delivering to and leaving with each of said defendants, personally, in the County of, at the time set opposite their names, respectively, a copy of said summons attached to a copy of the complaint referred to in said summons.

Names of Defendants Served.	Time of Service.
.....
.....

Dated,, 19..

....., Sheriff,

By, Deputy Sheriff.

Sheriff's Fees, \$....

§ 817. **Return on summons — Some defendants not served.** (*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify that I received the within summons on the day of, 19.., and personally served the same upon John Doe, one of the within named defendants, by delivering to and leaving with said John Doe, personally, in the County of, on the day of, 19.., a copy of said summons, attached to a copy of the complaint referred to in said summons.

And I further certify that, after due search and diligent inquiry, I have been unable to find the within named in County.

Dated,, 19..

....., Sheriff,

By, Deputy Sheriff.

Sheriff's Fees, \$....

§ 818. Return on summons served on local corporation. (California.)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify that I received the within summons on the day of, 19.., and personally served the same upon the Mud Springs Clay Bank, a corporation, by delivering to and leaving with Simon Sudds, the president of said The Mud Springs Clay Bank, a corporation, in the County of, on the day of, 19.., a copy of said summons; and that the copy so delivered to and left with said Simon Sudds, as president of, said defendant, was attached to a copy of the complaint referred to in said summons.

Dated,, 19..

....., Sheriff,

By, Deputy Sheriff.

Sheriff's Fees, \$....

NOTE.—In California, the summons, in a suit against a corporation formed under the laws of the state, must be delivered to the president or other head of the corporation, secretary, cashier, or managing agent thereof. The teller of a bank is not the managing agent. If the suit is against a foreign cor-

poration, or a non-resident joint stock company or association, the summons must be delivered to the managing or business agent, cashier, or secretary. (*California. Code Civ. Proc., sec. 411. See, also, secs. 104-106, ante.*)

§ 819. **Return on summons served on minor and administratrix.** (*California. See, also, secs. 104, 107, ante.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify that I received the within summons on the day of, 19.., and personally served the same on the day of, 19.., on Ellen Brown, and also on Ellen Brown as administratrix of the estate of James Brown, deceased, and also on Nellie B. Brown, a minor under the age of fourteen years, and also on Kate T. Brown, defendants named in said summons, by delivering to and leaving with said Ellen Brown, personally, and in her own right, in said County, a copy of said summons, with a copy of the complaint in the action named therein, and by delivering to and leaving with said Ellen Brown as administratrix of the estate of James Brown, deceased, personally, in said county, a copy of said summons, and by delivering to and leaving with said Ellen Brown, personally, as the mother of defendant Nellie B. Brown, a minor under the age of fourteen years, in said county, a copy of said summons, and by, at the same time, delivering to and leaving with said Nellie B. Brown, a minor, as aforesaid, personally, a copy of said summons, and by delivering to and leaving with the defendant, Kate

T. Brown, personally, in said county, a copy of said summons.

Dated, 19..

., Sheriff,

By, Deputy Sheriff.

Sheriff's Fees, \$. . . .

§ 820. Return on summons—Defendant of unsound mind. (*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify that I received the within summons on the day of, 19. . . ., and personally served the same upon John Doe, the within named defendant, by delivering to and leaving with said John Doe, personally, in the County of, on the day of, 19. . . ., a copy of said summons, and by delivering to and leaving with Richard Roe, guardian of said John Doe, personally, in the County of, on the day of, 19. . . ., a copy of said summons; and that the copy so delivered to and left with said John Doe was attached to a copy of the complaint referred to in said summons.

Dated, 19. . . .

., Sheriff,

By, Deputy Sheriff.

Sheriff's Fees, \$. . . .

§ 821. Return on summons where defendant cannot be found. (*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify that I received the within summons on the

.... day of, 19.., and that after due search and diligent inquiry I have been unable to find the within named defendant, Peter Jones, in County.

Dated, 19..

....., Sheriff,

By, Deputy Sheriff.

Sheriff's Fees, \$....

§ 822. **Return of summons by person other than officer.** (*California. See, also, secs. 794-798, ante.*)

In the Superior Court, County of, State of

James Boggs }
 ^{vs.}
Richard Roggs. }

Roothog R. Dye, being duly sworn, deposes and says: That he is, and at all times mentioned herein was, of the age of eighteen years and over, and not a party to the within action; that he received the within annexed summons on the day of, 19.., and personally served the same upon Richard Roggs, the within named defendant, on the day of, 19.., by delivering to and leaving with said Richard Roggs, said defendant, personally, in the County of, a copy of said summons, attached to a copy of the complaint referred to in said summons.

ROOTHOG R. DYE.

Subscribed and sworn to
before me, this
day of, 19.. }

§ 823. **Return on justice's court summons.** (*California.*)

County of, }
 Township. } ss.

I hereby certify that I received the within summons on the day of, 19.., and personally served the same by delivering to and leaving with, the defendant named herein, personally, a true copy of this summons, attached to a true copy of the complaint herein, in Township, County, this day of, 19..

., Constable.

By, Deputy.

Fees, \$.

§ 824. **Return on justice's court summons from another county.** (*California.*)

Sheriff's Office, }
 County of } ss.

I hereby certify that I received the within summons and certificate of the County Clerk of the County of, on the day of, 19..; that at the said County of, on this day of, 19.., I personally served said summons on, the within named defendant, by delivering to and leaving with him, personally, a copy of said summons and clerk's certificate attached thereto, and a copy of the complaint referred to in said summons, also attached thereto.

Dated, 19..

., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$.

§ 825. **Return on subpoena in civil cases.**
(*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify that I served the within subpoena, by showing the said within original to each of the following persons named therein, and delivering a true copy thereof to each of said persons, personally, on the day of, A. D. 19.., at the County of, to wit:, who did not demand fees, and, who demanded and received fees, \$....

Dated,, 19..

Sheriff's Fees, \$...., Sheriff.

Service, \$.... By, Deputy Sheriff.

Mileage, \$....

Total, \$....

§ 826. **Return by citizen on subpoena — Civil case.** (*California.*)

State of, }
County of } ss.

., being duly sworn, says: That he served the within subpoena, by showing the said within original to each of the following persons named therein, and delivering a true copy thereof to each of the said persons, personally, on the day of, A. D. 19.., at the said County of, to wit:, who did not demand fees, and, who demanded and received fees, \$....

Subscribed and sworn to }
before me, this }
day of, A. D. 19.. }
.

§ 827. **Return on subpoena in criminal case.**
(*California.*)

State of, }
County of } ss.

I,, Sheriff of the County of, hereby certify that I served the within subpœna, on the day of, 19.., on John Doe, Richard Roe, and Jane Jenks, being the witnesses named in said subpœna, at the County of, by showing the original to said witnesses, personally, and informing them of the contents thereof.

Dated,, 19..

., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$. . . .

§ 828. **Return on attachment of personal property.** (*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, do hereby certify that under and by virtue of the within and hereunto annexed writ of attachment, by me received on the day of, 19.., I did, on the day of, 19.., attach the following described personal property in the possession of, viz.: (description of property), and attached the same by taking into my custody (*and putting a keeper in charge*).

Dated,, 19..

., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$.

§ 829. Return on attachment — Undertaking given. (*California.*)

Sheriff's Office, }
County of } ss.

I hereby certify that I received the within writ of attachment on the day of, A. D. 19.., and the defendant having given me a bond, as required in said writ, in an amount sufficient to satisfy the demand, besides cost, I herewith return this writ of attachment without further service.

Dated,, 19..

., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$. . . .

§ 830. Return on attachment of real estate standing in defendant's name—Property occupied. (*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify and return that I received the hereunto annexed writ of attachment on the day of, A. D. 19.., and, by virtue of the same, did on the day of, A. D. 19.., attach all the right, title, claim and interest of, defendant (or either of them), of, in and to the following described real estate, situated in said County of, and State of, to wit: (description of the property). Said real estate standing on the records of said county in the name of, was attached as follows: By filing with the recorder of said county of, on the day of, A. D. 19.., a copy of the writ, together with a description of the property attached,

and a notice that it is attached; and by leaving a similar copy of the writ, description and notice with an occupant of the property.

Dated,, 19..

., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$. . . .

§ 831. **Return on attachment of real estate standing in defendant's name—No occupant.**
(*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify and return that I received the hereunto annexed writ of attachment on the day of, A. D. 19.., and, by virtue of the same, did on the day of, A. D. 19.., attach all the right, title, claim and interest of, defendant (or either of them), of, in and to the following described real estate, situated in said County of, State of, to wit: (description of the property). Said real estate standing on the records of said county in the name of, was attached as follows: By filing with the Recorder of said County of, on the day of, A. D. 19.., a copy of the writ, together with a description of the property attached, and a notice that it is attached, and by posting a similar copy of the writ, description and notice, in a conspicuous place on the property attached, there being no occupant.

Dated, 19....

., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$. . . .

§ 832. Return on attachment of real estate standing in name of person other than defendant.
(California.)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify and return that I received the hereunto annexed writ of attachment on the day of A. D. 19.., and, by virtue of the same, did, on the day of A. D. 19.., attach all the right, title, claim and interest of, defendant.. (or either of them) of, in and to the following described real estate, situated in said County of, and State of, to wit: (description of the property). Said real estate standing on the records of said county in the name of John Doe, was attached as follows: By filing with the Recorder of said County of, on the day of, A. D. 19.., a copy of the writ, together with a description of the property attached, and a notice that all the right, title and interest of, said defendant, standing on the records of said county in the name of John Doe is attached; and by leaving a similar copy of the writ, description and notice with an occupant of the property (*or, as the case may be*, posting a similar copy of the writ, description, and notice in a conspicuous place on the property attached, there being no occupant); and by delivering to and leaving with said John Doe a similar copy of the writ, description and notice.

Dated,, 19..

., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$. . . .

NOTE.—When the property attached stands on the records in the name of a person other than a defendant, a copy of the writ, description and notice must be left with such other person or his agent, if known and within the county, or at the residence of either, if within the county. If such other person or his agent, or the residence of either, cannot be found, the return should state the fact that, “after due search and diligent inquiry I have been unable to find said John Doe, or any agent of his, or any residence of either in County.”

§ 833. Return on garnishment on individual with statement of garnishee. (*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, do hereby certify and return that I received the hereunto annexed writ of attachment on the day of, 19.., and by virtue thereof I have duly attached all moneys, goods, effects, debts due or owing, or any other personal property belonging to the defendants therein named, or either of them, in the possession or under the control of John Jenks, by delivering to and leaving with said John Jenks, personally, in County, on the day of, A. D. 19.., a copy of said writ of attachment with a notice in writing indorsed thereon that such property was attached by virtue of said writ, and not to pay over or transfer the same to any one but the sheriff of County, or some one legally authorized to receive the same. I also demanded a statement in writing of the amount of the same, to which I received the following answer:

“ }
 vs. }
 }

"To notice of garnishment and demand for a statement served on me, this day of, A. D. 19.., by the Sheriff of County, under and by virtue of an issued in the above entitled cause, my answer is that I am indebted to, said defendant, in the sum of dollars, and that I have in my possession and under my control personal property belonging to said defendant, to wit: (description.) (Signed)"

Dated,, 19..

. . . ., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$. . . .

§ 834. Return on garnishment on individual who made no statement. (California.)

Sheriff's Office, } ss.
County of }

I,, Sheriff of the County of, do hereby certify and return that I received the hereunto annexed writ of attachment on the day of, 19.., and by virtue thereof I have duly attached all moneys, goods, effects, debts due or owing, or any other personal property belonging to the defendants therein named or either of them, in the possession or under the control of Jacob Jones, by delivering to and leaving with said Jacob Jones, personally, in the County of, on the day of, 19.., a copy of said writ of attachment with a notice in writing indorsed thereon that such property was attached by virtue of said writ, and not to pay over or transfer the same to any one but the Sheriff of County, or some one legally authorized to receive the same. I also demanded a statement in writing of the amount of the same, to which

said Jacob Jones has failed, neglected and refused to answer.

Dated,, 19..

., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$. . . .

§ 835. **Return on garnishment on corporation.**
(*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, do hereby certify and return that I received the hereunto annexed writ of attachment on the day of, 19.., and by virtue thereof I have duly attached all moneys, goods, effects, debts due or owing, or any other personal property belonging to the defendants therein named, or either of them, in the possession or under the control of The First National Bank of Tar Flat, by delivering to and leaving with Oliver Twist, president of said The First National Bank of Tar Flat, personally, in the County of, on the day of, A. D. 19.., a copy of said writ of attachment, with a notice in writing indorsed thereon that such property was attached by virtue of said writ, and not to pay over or transfer the same to any one but the Sheriff of County, or some one legally authorized to receive the same. I also demanded a statement in writing of the amount of the same, to which I received the following answer: (answer—*See sec. 833, ante*).

Dated,, 19..

., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$. . . .

§ 836. Return on execution—Levy and sale of personal property. (*California.*)

State of , } ss.
County of

I,, Sheriff of the County of, do hereby certify that under and by virtue of the within and hereunto annexed writ of execution, by me received on the . . . day of . . . , A. D. 19. . . , I did, on the . . day of . . . , A. D. 19. . . , levy upon the personal property hereinafter described, and noticed the same for sale as the law directs (by posting written notice of the time and place of sale), particularly describing the property, for days successively, in three public places of the township or city where said property was sold, and on , the day of , A. D. 19. . . , at o'clock, . . M. of said day, (place of sale), in said county, the time and place fixed for said sale, I did attend and offered for sale at public auction, for United States gold coin, the property described: (description). And sold the whole of the same in separate parcels to various purchasers for the sum of dollars, in United States gold coin, said purchasers being the highest bidders, and said sum being the highest bid, in the aggregate, for the same; and I have given such purchaser, , a certificate of said sale. (Here state satisfaction of the judgment, or otherwise, as indicated in form of return on levy and sale of real estate. *See sec. 837, post.*)

And I further certify that I deducted from the said sum of \$. . . . , my fees, commission and expenses, amounting to the sum of \$. . . . , leaving a net balance

of \$...., which I have paid to plaintiff's attorney, whose receipt therefor is hereto attached.

Dated,, 19..

....., Sheriff.

By, Deputy Sheriff.

§ 837. Return on execution—Levy and sale of real estate. (*California.*)

State of, }
County of } ss.

I,, Sheriff of the County of, do hereby certify that under and by virtue of the within and hereunto annexed writ of execution, by me received on the day of, A. D. 19.., I did, on the day of, A. D. 19.., levy upon the lands hereinafter described, and noticed the same for sale as the law directs (by posting written notice of the time and place of sale, particularly describing the property, for twenty days successively in three public places of the township or city where said property is situated, and also where said property was to be sold, and publishing a copy thereof once a week for the same period in the, a newspaper published in said County of), and on, the day of, A. D. 19.., at o'clock .. M. of said day, in front of the Court House door of said County, the time and place fixed for said sale, I did attend and offered for sale at public auction, for United States gold coin, the property described: (description). And sold the whole of the same to, for the sum of dollars, in United States gold coin, said being the highest bidder, and said sum being the highest bid for the same; and I have given said purchaser,, a certificate of said sale, and

have filed a duplicate thereof for record with the Recorder of said County of; and I herewith return said writ fully satisfied. (If the proceeds of sale do not satisfy the judgment, omit the last clause to that effect, and state that, "after due search and diligent inquiry, I have been unable to find any other property belonging to the within named defendants, or either of them, not exempt from execution, in County, out of which to make the remainder of said judgment, or any part of such remainder, and herewith return said writ partly satisfied, to wit: in the sum of \$. . . .")

And I further certify that I deducted from the said sum of \$. . . ., my fees, commission and expenses, amounting to the sum of \$. . . ., leaving a net balance of \$. . . ., which I have paid to plaintiff's attorney, whose receipt therefore is hereto attached.

Dated,, 19..

., Sheriff.

By, Deputy Sheriff.

§ 838. **Return on foreclosure.** (*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, do hereby certify: That by virtue and in pursuance of the annexed order of sale and decree of foreclosure and sale, I advertised the property described as follows, to wit: (description), to be sold by me in front of the Court House door in the City of, County of, on the day of, A. D. 19.., at o'clock .. M.; that previous to said sale I

posted written notice, particularly describing the property, for twenty days, in three public places of the township or city where the property is situated, and also where the property was to be sold; and also caused due and legal written notice thereof to be published once a week for the same period, preceding said sale, in the, a newspaper published in the County of, and that on, the day of, 19.., the day on which said premises were so advertised to be sold as aforesaid, I attended at the time and place fixed for said sale, and exposed the said premises for sale in parcel at public auction, according to law, to the highest bidder for cash when, being the highest bidder therefor, the said premises were struck off by me to the said, for the sum of dollars, in United States gold coin, which was the whole price bid, and which I acknowledge to have received; and that I delivered to said purchaser a certificate of said sale, and filed a duplicate thereof in the office of the County Recorder of the said County.

And I further certify that I deducted from the said sum of \$. . . . my fees, commission and expenses, amounting to the sum of \$. . . ., leaving a net balance of \$. . . ., which net balance I have paid to plaintiff's attorney, whose receipt therefor is hereto attached.

(Here state the satisfaction of judgment or amount of deficiency as the case may be. (*See sec. 837, ante.*)

Dated,, 19..

., Sheriff.

By, Deputy Sheriff.

§ 839. Return on replevin — Property delivered to plaintiff. (California.)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify and return, that on the day of 19.., I executed the order indorsed hereon, for delivery of the personal property mentioned in the within affidavit, by taking possession of the same (or all thereof to be found in my county), to wit: (description of property taken), and at the same time I delivered to the defendant, Jonathan Wild, a copy of the within affidavit and order, and undertaking duly approved by me, and defendant having failed to except to the surety therein, and also having omitted to require a return of said property, and no other person than the defendant having made claim thereto, I did at the expiration of the time prescribed by the statute for seeking such delivery and making such claim, to wit: on the day of, 19.., deliver the property so taken to the plaintiff, as by said order I am commanded.

Dated,, 19..

., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$. . . .

§ 840. Return on replevin—Property re-delivered to defendant. (California.)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify and return, that on the day of 19..,

I executed the order indorsed hereon, for delivery of the personal property mentioned in the within affidavit, by taking possession of the same (or all thereof to be found in my county), to wit: (description of property taken), and at the same time I delivered to the defendant, Jonathan Wild, a copy of the within affidavit and order and undertaking, duly approved by me, and the defendant not having excepted to such surety, claimed the redelivery of said property by giving me an undertaking in due form, and the sureties thereon having justified, and no other person having made claim to said property in due form of law, I redelivered the said property to the defendant.

Dated,, 19..

., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$. . . .

§ 841. **Return on writ of restitution.** (*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, do hereby certify that under and by virtue of the within writ of restitution, by me received on the day of, 19.., I served the same on the day of, 19.., by placing the within named in quiet and peaceable possession of the lands and premises therein described. (I further certify that after due search and diligent inquiry I have been unable to find any property belonging to the within named defendant, in County, not exempt from execu-

tion, out of which to make the within money judgment, or any part thereof, and I herewith return said writ without further service, fully satisfied as to the plaintiff's possession of the lands and premises therein described, and wholly unsatisfied as to said money judgment.)

Dated,, 19..

., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$....

NOTE.—If any money is made by levy and sale, or otherwise, the return as to the money judgment will be the same as in return on writs of execution. If the officer put the plaintiff's agent in possession, the return should show that the writ was served "by placing the within named plaintiff, by his agent, John Roe, in quiet and peaceable possession," etc.

§ 842. Return on writ of restitution—Not served, strangers in possession. (California.)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify and return that I received the within hereunto annexed writ of restitution on the day of, 19.., and that on the day of, 19.., I proceeded to the premises therein described for the purpose of serving said writ, and that neither H. F. Larabee, the within named defendant, nor any agent of said Larabee, was then or has been since in the possession of said premises; and that said premises were in the possession of and occupied by L. H. Brown, who then and there claimed possession thereof as heir of George Brown, deceased, owner in fee simple of said premises, and also claimed possession

of said premises as executor of the last will of George Brown, deceased, owner in fee simple of said premises; and said L. H. Brown, as such executor, claimed possession and title to the said premises by title superior to and entirely independent of any claim or title or possession of plaintiff or defendant named in said writ. I further certify that, after due search and diligent inquiry, I have been unable to find any property belonging to the within named defendant, in County, not exempt from execution, out of which to make the money judgment in said writ, or any part thereof, and I herewith return said writ without further service, wholly unsatisfied.

Dated,, 19..

., Sheriff.

By, Deputy Sheriff.

§ 843. **Return on writ of assistance.** (*California.*)

(The same form of return may be used as in writ of restitution (*secs. 841, 842, ante.*) There is no money judgment required to be made by the writ of assistance, and no return required except as to putting plaintiff in possession.)

§ 844. **Return on writ of certiorari.**

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify that I received the within writ on the day of, 19.., and served the same on the day of, 19.., by delivering to and leaving with

Hezekiah Lorgs, personally, in County, a copy of the within writ.

Dated,, 19..

., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$. . . .

§ 845. **Search warrant.** (*California.*)

County of }
 Township. } ss.

The People of the State of to any sheriff, constable, marshal, or policeman in the County of

Proof, by affidavit, having been this day made before me by (naming every person whose affidavit has been taken), that (stating the grounds of the application), you are therefore commanded, in the daytime (or at any time of the day or night, as the case may be), to make immediate search on the person of C D) or in the house situated, (describing it, or any other place to be searched, with reasonable particularity, as the case may be), for the following property: (describing it with reasonable particularity); and if you find the same, or any part thereof, to bring it forthwith before me at (stating the place).

Given under my hand, and dated this day of, A. D. 19..

E F, Justice of the Peace (or as the case may be).

§ 846. **Return on search warrant.** (*California.*)

County of, }
 Township. } ss.

I hereby certify that I have served the within warrant, and have the property described therein in the

place designated, in the possession of, and having cause to believe that said stole said property, I have arrested him, and have him with the goods here in court.

Dated,, 19..

., Constable.

§ 847. **Affidavit to inventory with search warrant.** (*California. See Code Civ. Proc., sec. 1537.*)

County of, } ss.
 Township. }

I,, the officer by whom the warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant.

Subscribed and sworn to before me, }
 this day of, 19.. }

§ 848. **Return on citation.** (*California.*)

Sheriff's Office, } ss.
 County of }

I,, Sheriff of the County of, do hereby certify that I served the within citation on the within named, by delivering to, personally, a copy thereof, on the day of, A. D. 19.., at said county.

Dated,, 19..

., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$....

§ 849. **Return on service of injunction on individual.** (*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify that I received the annexed order of injunction on the day of, 19.., and personally served the same on the day of, 19.., upon Silas Snooks, defendant, by delivering to said Silas Snooks, personally, in the County of, a copy of said order of injunction and of the summons, and a copy of the verified complaint in said action therein named.

Dated,, 19..

., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$. . . .

§ 850. **Return on injunction against county and supervisors.** (*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify that I received the annexed writ of injunction on the day of, 19.., and duly served the same on said day of, 19.., by personally delivering to and leaving with each of the following named persons, as members of the Board of Supervisors of the County of, in the said County of, on said day, a copy of said writ of injunction attached to a copy of the complaint mentioned in said writ of injunction, which said copy of the complaint had attached to it the verification to the origi-

nal complaint: (insert names of persons served). And I further certify that, at the time of said service, said persons were members of the Board of Supervisors of the County of, the defendant named in said writ of injunction and complaint, and that said persons were so served as members of said board.

And I further certify that I served the said writ of injunction on the defendant, "The County of," on the day of, 19.., by personally delivering to and leaving with, president of the Board of Supervisors of said County of, a copy of said writ of injunction attached to a copy of the complaint mentioned in said writ of injunction, which said copy of the complaint had attached to it a copy of the verification to the original complaint.

Dated,, 19..

., Sheriff.

By, Deputy Sheriff.

Sheriff's Fees, \$. . . .

§ 851. Return on habeas corpus — Prisoner in custody. (California.)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, do hereby return to the Honorable Judge of the Superior Court of County, that before the coming to me of the within writ, the said Petroleum V. Nasby was committed to my custody, and that he now is detained by virtue of a commitment, a copy of which is hereto annexed, the original of which I also herewith pro-

duce; nevertheless I have the body of the said Petroleum V. Nasby before you at the time and place within mentioned, as I am within commanded.

Dated,, 19..

., Sheriff.

By, Deputy Sheriff.

§ 852. Return on habeas corpus — Prisoner released on bail. (California.)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, in obedience to the order contained in the within writ, do hereby return to the Honorable Court of the County of, State of, that before the coming to me of the said writ, the said was committed to my custody by virtue of a commitment, a copy of which is hereto annexed, the original of which I also produce; and that said has been allowed to go upon bail approved by a judge of the Court of the County of in said State, the bail bond whereof is filed with the clerk of said Court.

Dated,, 19..

., Sheriff.

By, Deputy Sheriff.

§ 853. Return on habeas corpus—Prisoner held on oral charge. (California.)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify and make return to the writ of *habeas corpus* in the matter of the application of in the Court of the County of, as follows, to wit: That

on the day of, 19.., I received into my custody the said, and he was so placed in my charge and custody by one, Constable of Township, of the County of, and on the said receipt of said and the placing of said into my custody by said, he, the said, placed a charge and charged said with the crime of, and under and by virtue of said charge so preferred by said, and by the law in such cases made and provided, and by no other warrant or process, I hold said in my custody.

Dated,, 19..

., Sheriff.

By, Deputy Sheriff.

§ 854. Return on habeas corpus—Prisoner held on judgment pending appeal. (*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, do hereby return to the Honorable, Judge of the Court of the County, that before the coming to me of the within writ, the said was committed to my custody, and is detained, by virtue of an order made by the Honorable, Judge of the Court of County, a certified copy of which is hereto annexed; and that said is held in my custody under and by virtue of a judgment in the case of the People of the State of against, in the Court of the County of, a certified copy of which judgment I herewith produce; and that said is also detained by me by virtue of a certificate of probable cause, made by the Honorable, Judge of the Court of the State of, and dated,

19... for the appeal prosecuted by said to the Supreme Court of the State of, a copy of which certificate is hereto annexed:

Nevertheless, I have the body of the said before you at the time and place within mentioned, as I am within commanded.

Dated,, 19..

....., Sheriff.

By, Deputy Sheriff.

§ 855. Return on habeas corpus—Prisoner held by United States court.

Sheriff's Office, }
County of } ss.

To the Honorable Court of the County of,
State of:

In return to the writ of *habeas corpus* issued to me, commanding me to produce before your Honorable Court the body of, now in my custody, I hereby produce and return to you a certified copy of an order of the Court of the United States for the District of, made on the day of, 19.., by which order the said was ordered to be imprisoned in the County Jail of County,, and under which he was committed to my custody on the day of 19.., by the United States Marshal for the said District of, and by virtue of which order I now hold said I further certify that I also hold said in my custody in obedience to two certain further orders of said Court, certified copies of which I also herewith produce, marked respectively "Order to Show Cause and Restraining Order," and "Certified Copy of Order."

I return said certified copies of said orders as a sufficient return to said writ and all that I am authorized to return by law. (*See Abelman v. Booth*, 21 How. (U. S.) 506, 16 L. Ed. 169, and *Tarble's Case*, 13 Wall. (U. S.) 397, 20 L. Ed. 597.) So, answers:

Dated,, 19..

., Sheriff.

By, Deputy Sheriff.

§ 856. Return on warrant of arrest.

Sheriff's Office, }
County of } ss.

I hereby certify that I received the within warrant on the day of, 19.., and served the same by arresting the within named defendant on the day of, 19.., and bringing him into court this day of, 19..

., Sheriff.

By, Deputy Sheriff.

§ 857. Return on warrant—Defendant released on bail.

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, hereby certify that I have served the within warrant by arresting the within named defendant,, on the day of, 19..; and said defendant having given the required bail, in the sum of dollars, with and as sureties, and said bail having been approved by the Honorable, Judge of the

Court of the County of, I have released said defendant from custody.

Dated,, 19..

., Sheriff.

By, Deputy Sheriff.

§ 858. Certificate of surrender of prisoner by bondsmen.

Sheriff's Office, } ss.
County of }

., one of the sureties upon the bail bond of, charged (state charge against prisoner), having delivered to me a certified copy of the bail bond of, together with his statement in writing, surrendering said, and I, having thereupon taken in custody the said, whom I now hold, I do now certify and by this certificate acknowledge that said has surrendered the said, and that said is now in my custody.

Dated,, 19..

., Sheriff.

By, Deputy Sheriff.

§ 859. Return on order of arrest—Prisoner discharged on habeas corpus and bail given.

Sheriff's Office, } ss.
County of }

I,, Sheriff of the County of, hereby certify and return that I received the within annexed certified copy of Order and Judgment on the day of, 19.., and served the same by arresting the therein named on said day of, 19.., and taking him into my custody; and that I

held and detained him in my custody under said order and judgment, until he was, in due form of law, removed from my custody by writ of *habeas corpus*, on said day of, 19.., granted by Honorable, Associate Justice of the Supreme Court of the State of, and was then and there discharged from such arrest, by an order contained in said writ admitting said to bail in the sum of dollars.

Dated,, 19..

., Sheriff.

By, Deputy Sheriff.

§ 860. Return on order of arrest — Arrest and bail in justice's court. (*California.*)

County of, }
 Township. } ss.

I hereby certify that I have served the above order, by arresting and bringing into court the said, this day of, A. D. 19.., at o'clock .. M., and that I have notified the plaintiff thereof.

., Constable.

By, Deputy.

§ 861. Return on venire for jurors.

Sheriff's Office, }
 County of } ss.

I,, Sheriff of the County of, hereby certify that I received the within and hereunto annexed venire for jurors, on the day of, A. D. 19.., and by virtue of the same have personally summoned the hereinafter named persons to be and appear at the time and place therein named, to act as jurors. I also certify that they were sum-

moned at the time and in the manner set opposite their respective names, viz.: by leaving with them personally, when they could be found, the notice required by statute, and when they could not be found, by leaving such notice at their respective places of residence with some person of suitable age.

Names. | Manner of Service. | Time of Service. | No. Miles.

Dated,, 19..

., Sheriff.

By, Deputy Sheriff.

§ 862. **Return on death warrant.** (For states in which death warrants are executed by sheriffs.)

Sheriff's Office, }
County of } ss.

I,, Sheriff of the County of, do hereby certify and return that I received the within warrant on the day of, A. D. 19.., and that, in compliance with three certain orders of reprieve, granted by the Honorable, Governor of the State of, and issued under the great seal of the State of, and delivered to me, the execution of the within named was postponed by me until the day of, A. D. 19.., on which said last-named day, between the hours of 9 o'clock in the forenoon and 4 o'clock in the afternoon of said day, to wit: between the hours of and o'clock of said day, in pursuance of said warrant and reprieves, said was executed by me, as such sheriff, by hanging by the neck until he was dead, in the jail yard of the jail of said County of; and that said execution was conducted in conformity to the provisions of law of this State concerning capital

punishment, and of the sentence referred to in said warrant.

Dated at, this day of, A. D. 19..
, Sheriff.

§ 863. **Return on notice of land office contest.**

State of California, }
 County of } ss.

., being duly sworn, says that he is acquainted with, named within, in the contest of v. . . .; that he served the notice of contest herein on said at, on day, the day of, A. D. 19.., by handing to and leaving with said a true copy of the said notice of contest herein.

Subscribed and sworn to before
 me this day of, 19.. }
 }

§ 864. **Order for attachment of personal property.** (*California.*)

In the Court of the County of, State of

. }
vs. }
 }

To, Sheriff of County:

You are hereby instructed to attach, by virtue of the accompanying writ, in the above entitled suit, the following described property, and place a keeper in charge at plaintiff's expense, viz.: (description).

Dated,, 19..

.,
 Attorney for Plaintiff.

§ 865. **Sheriff's notice of garnishment.** (*California.*)

Sheriff's Office, }
County of } ss.

To Mr. :

You will please take notice that all moneys, goods, credits, effects, debts due or owing, or any personal property in your possession or under your control, belonging to the within named defendant. . . , or either of them, are attached by virtue of a writ of which this is a copy, and you are notified not to pay over or transfer the same to any one but the Sheriff of County, or some one legally authorized to receive the same, but conduct yourself in accordance with the statutes in such case made and provided. I also require of you a statement in writing of the amount of the same.

Dated,, 19..

., Sheriff.

By, Deputy Sheriff.

§ 866. **Answer to garnishment.** (*California.*)

In the Court of the County of, State of

. }
vs. }
. }

To the notice of garnishment and demand for a statement served on me this . . . day . . ., A. D. 19.., by the Sheriff of County, under and by virtue of an issued in the above entitled cause, my answer is, that I am indebted to, said de-

fendant. . . , in the sum of dollars, and that I have in my possession and under my control personal property belonging to said defendant, to wit: (property).

(Signed)

Dated,, 19..

§ 867. **Sheriff's inventory and keeper's receipt.**
(*California.*)

.....
vs. } Sheriff's Inventory.
.....

By virtue of a writ of against the defendant in the above entitled cause, for \$. . . . , with interest and costs, duly attested the day of , A. D. 19.., I have levied upon the following property upon the premises of , and in possession, , to wit: (description).

Dated,, 19..

....., Sheriff.

By, Deputy Sheriff.

The following is the keeper's indorsement on above form:—

KEEPER'S RECEIPT.

I hereby acknowledge that I have received the within described property so levied upon by the Sheriff of County, from said Sheriff, and hereby promise and undertake to return the same, and every part thereof, to the said Sheriff on demand.

Dated,, 19..

....., Sheriff's Keeper.

§ 868. **Notice of attachment of stocks.** (*California.*)

Sheriff's Office, }
County of }

To The Happy Clam Mining Company, and David
Digger, Secretary of said Company:

You will please take notice that all stocks or shares, or interest in stocks or shares, of The Happy Clam Mining Company, in your possession or under your control, belonging to the within named defendant, are attached by virtue of the writ, of which this is a copy, and you are notified not to transfer or deliver over the same to any one but the Sheriff or County. I also require of you a statement in writing of the amount of the same.

Dated,, 19..

....., Sheriff.

By, Deputy Sheriff.

§ 869. **Order for attachment of real estate.**

In the Court of the County of, State
of

..... }
vs. }
..... }

To, Sheriff of County:

You are hereby instructed to attach, by virtue of the accompanying writ, in the above entitled suit, the following described property, standing on the records of County in the name of, to wit: (description).

Dated,, 19..

.....,
Attorney for Plaintiff.

§ 870. **Notice of attachment of real property.**
(*California.*)

[TO ATTACH TO COPY OF WRIT.]

State of ,
County of } ss.

Notice is hereby given that, under and by virtue of a writ of attachment, issued out of the Court of County, State of , of which the annexed is a true copy, I have this day attached all the right, title, claim and interest of , defendant., or either of them, of, in and to the following described real estate, standing on the records of County in the name of , and particularly described as follows: (description of property).

Dated, , 19..

. , Sheriff.

By , Deputy Sheriff.

§ 871. **Order for release of attachment.**

.
vs. }
.

To , Sheriff of County:

You are hereby directed and ordered to release all the property attached by you in the above entitled action, and return the writ of attachment to the court from which it was issued.

Dated, , 19..

. ,
Plaintiff's Attorney.

§ 872. **Undertaking to prevent attachment.**
(*California.*)

In the Court of the County of, State
of

..... }
vs. }
..... }

Whereas, the above named plaintiff has commenced an action in the aforesaid court, against the above named defendant, for the recovery of dollars,; and whereas, an attachment has been issued, directed to, Sheriff of the County of, and placed in his hands for execution, whereby he is commanded to attach and safely keep all the property of the said defendant within his county not exempt from execution, or so much thereof as might be sufficient to satisfy the plaintiff's demand therein stated, in conformity to the complaint, in the sum of dollars,, unless the defendant give him security by the undertaking of two sufficient sureties, in an amount sufficient to satisfy said demand, beside costs, in which case to take such undertaking;

And whereas, the said defendant is desirous of giving the undertaking mentioned in the said writ:

Now, therefore, we, the undersigned, residents of the, in consideration of the premises and to prevent the levy of said attachment, do hereby jointly and severally undertake, in the sum of dollars, and promise to the effect that if the plaintiff shall recover judgment in said action, we will pay to the plaintiff upon demand the amount of said judgment, together with the costs, not exceeding in all the said sum of dollars.

Dated at, the day of, 19..

..... [SEAL.]

..... [SEAL.]

State of , }
County of } ss.

. . . . and , whose names are subscribed as sureties to the above undertaking, being severally duly sworn, each for himself deposes and says: That he is a resident and holder of the , County of and is worth the sum in the said undertaking specified as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

Subscribed and sworn to before me, }
this day of , A. D. 19.. }

§ 873. Undertaking on release of attachment.
(*California.*)

In the Court of the County of , State of

. }
vs. }
. }

Whereas, the above named plaintiff.. commenced an action in the Superior Court of the County of , of the State of , against the above named defendant.., claiming that there was due to said plaintiff.. from said defendant.. the sum of dollars, or thereabouts, and thereupon an attachment issued against the property of said defendant.. as security for the satisfaction of any judgment that might be recovered therein, and certain property and effects of the said defendant.. have been attached and seized by the sheriff of said county, under and by virtue of said writ;

And whereas, the said defendant.. desirous of having said property released from attachment;

Now, therefore, we, the undersigned, residents and holders in the County of, in consideration of the premises, and also in consideration of the release from said attachment of the property so attached, as above mentioned, do hereby jointly and severally undertake, in the sum of dollars, and promise that in case the plaintiff . . recover judgment in the action, defendant . . will, on demand, pay to plaintiff . . the amount of whatever judgment may be recovered in said action, together with the percentage, interest and costs, the same to be paid in United States gold coin, if so required by the terms of the judgment.

Dated at, the day of, 19..

.....

(Insert affidavit of qualification of sureties as in preceding blank.)

§ 874. **Indemnity bond in attachment.**

KNOW ALL MEN BY THESE PRESENTS:

That we,, of the County of, as principal, and, of the said county, and, of the said county, as sureties, are held and firmly bound unto, Sheriff of the County of, in the sum of dollars, gold coin of the United States of America, to be paid to the said sheriff, or his certain attorney, executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals.

Dated, the day of, A. D. 19..

Whereas, under and by virtue of a writ of attachment issued out of the Court of the County of, of the State of, in the action of, plaintiff, against, defendant, directed and delivered to said, Sheriff of the County of, the said sheriff was commanded to attach and safely keep all the property of such defendant, within his said county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, amounting to dollars, as therein alleged, and the said sheriff did thereupon attach the following described goods and chattels: (description of goods).

And whereas, upon the taking of the said goods and chattels by virtue of the said writ, claimed the said goods and chattels as h. . . property.

And whereas, the said plaintiff hereby expressly waiving a trial by a sheriff's jury of the right of property, require of said sheriff that he shall retain said property under such attachment and in his custody.

Now, therefore, the condition of this obligation is such that if the said, as principal, and and, as sureties, their heirs, executors and administrators, shall well and truly indemnify and save harmless him, the said sheriff, his heirs, executors, administrators and assigns, of and from all and any damages, expenses, costs and charges, including all counsel fees for which he, the said sheriff, his heirs, executors, administrators or assigns, may incur in consequence of the legal enforcement of the payment of the penalty of this bond; and against all loss and liability which he, the said sheriff, his heirs, executors, administrators or assigns, shall sustain or in any wise

be put to, for or by reason of the attachment, seizing, levying, taking or retention by him, the said sheriff, in his custody, under said attachment of the property claimed as aforesaid.

And that it may be lawful for the said sheriff, his heirs, executors, administrators or assigns, to bring suit against the principal and sureties hereto, or either of them, or their or either of their executors, administrators or assigns, immediately upon the rendition of any judgment against the plaintiff in said cause or against the said sheriff, his heirs, executors, administrators or assigns. And that said sheriff shall not be required first to pay the said judgment in order to entitle him or his legal representatives to maintain such suit and recover judgment thereon—then the above obligation to be void, otherwise to remain in full force and virtue.

In case suit or suits at law or in equity, or any proceeding to be brought against the said, sheriff, or against him individually, or against him in any capacity, jointly with other person or persons, or alone, for or on account of the property so levied upon, or for the conversion of the same, the said shall and may select his own counsel to act in any such matter with the attorney or attorneys of the principal in this bond named, and the reasonable fees of such counsel shall be a charge against said principal and be secured by this bond. So likewise in case of suit or any event requiring the advice of counsel in and about the custody or detention of said property, the said shall be at liberty to consult counsel of his own choice, and the reasonable fee of such counsel shall be secured by this bond. In addition, and as cumulative to remedy by suit against the sure-

ties hereto, it is and shall be the right and privilege of the said, immediately upon the rendition of any judgment against the plaintiff in this cause or against the said, to apply in the court wherein such judgment was rendered, and upon filing this bond, to have judgment thereon rendered in his favor against the principal and sureties hereon for the full amount of any such judgment, including all costs, damages, expenses and counsel fees as the said may have incurred in the said action, as well as counsel fees for advice, and expense of keeping or storing property kept hereinunder. And the principal and sureties hereto expressly waive any notice of any such application, and consent to the entry of such judgment, consenting and stipulating also that the estimate of said as to the amount of expenses, counsel fees, storage and the like, shall be final, binding and conclusive. The remedies herein provided shall not exclude any other legal relief, but are cumulative to the other rights, legal and equitable, of said In case of any recovery against said growing out of the seizure or detention of the property herein mentioned, then in any proceeding by said, upon this bond, any defense based upon illegality of the consideration hereof, or the unlawfulness of the act or acts of said, as sheriff or otherwise, is hereby expressly waived.

Sealed and delivered in presence of }
 }

§ 875. Order for levy and sale of personal property.

In the Court of the County of, State
of

..... }
vs. }
..... }

To, Sheriff of County:

You are hereby instructed to levy upon and sell,
by virtue of the accompanying writ, in the above en-
titled suit, the following described personal property,
belonging to the defendant herein: (descrip-
tion).

Dated,, 19..

.,
Attorney for Plaintiff.

**§ 876. Indemnity bond under execution — Per-
sonal property claimed by third party.**

KNOW ALL MEN BY THESE PRESENTS:

That we, of the County of, as principal,
and, of the said county, and, of the said
county,, as sureties, are held and firmly bound
unto, Sheriff of the County of, in the sum
of dollars, gold coin of the United States of
America, to be paid to the said sheriff, or his certain
attorney, executors, administrators or assigns, for
which payment well and truly to be made we bind
ourselves, our heirs, executors and administrators,
jointly and severally, firmly by these presents. Sealed
with our seals.

Dated,, the day of, A. D. 19..

Whereas, under and by virtue of a writ of execu-
tion, issued out of the Court of the County
of, of the State of, in the action of,

plaintiff, against, defendant, directed and delivered to said, Sheriff of the County of, the said sheriff was commanded to satisfy the judgment, with interest, out of the personal property of such defendant within his county not exempt from execution, and if sufficient personal property could not be found, then out of the real property belonging to him on the day when the said judgment was docketed, or at any time subsequently, the said sheriff did thereupon levy upon and take into his possession the following described goods and chattels, to wit: (description of goods).

And whereas, upon the taking of the said goods and chattels by virtue of the said writ, claimed the said goods and chattels as h. . . property;

And whereas, the said plaintiff hereby expressly waiving a trial by a sheriff's jury of the right of property, require of said sheriff that he shall retain said property, under such levy, and sell the same, and apply the proceeds thereof to the satisfaction of said judgment, interest and costs of suit;

Now, therefore, the condition of this obligation is such that if the said, as principal, and and, as sureties, their heirs, executors and administrators, shall well and truly indemnify and save harmless him, the said sheriff, his heirs, executors, administrators and assigns, of and from all and any damages, expenses, costs and charges, including all counsel fees which he, the said sheriff, his heirs, executors, administrators or assigns, may incur in consequence of the legal enforcement of the payment of the penalty of this bond, and against all loss and liability which he, the said sheriff, his heirs, executors, administrators or assigns, shall sustain or in anywise

be put to, for or by reason of the attachment, seizing, levying, taking, retention in his custody, or selling by him, the said sheriff, under said writ, of the property claimed as aforesaid.

And that it may be lawful for the said sheriff, his heirs, executors, administrators or assigns, to bring suit against the principal and sureties hereto, or either of them, or their or either of their executors, administrators or assigns, immediately upon the rendition of any judgment against the plaintiff in such cause, or against the said sheriff, his heirs, executors, administrators or assigns. And that said sheriff shall not be required first to pay the said judgment in order to entitle him or his legal representatives to maintain such suit and recover judgment thereon—then the above obligation to be void, otherwise to remain in full force and virtue.

In case suit or suits at law, or in equity, or any proceeding to be brought against the said, sheriff, or against him individually, or against him in any capacity, jointly with other person or persons, or alone, for or on account of the property so levied upon, or for the conversion of the same, the said shall and may select his own counsel to act in any such matter with the attorney or attorneys of the principal in this bond named, and the reasonable fees of such counsel shall be a charge against said principal and be secured by this bond. So, likewise, in case of suit or any event requiring the advice of counsel in and about the custody or detention of said property, the said shall be at liberty to consult counsel of his own choice, and the reasonable fee of such counsel shall be secured by this bond. In addition, and as cumulative to remedy by suit against the sure-

ties hereto, it is and shall be the right and privilege of the said, immediately upon the rendition of any judgment against the plaintiff in this cause, or against the said, to apply in the court wherein said judgment was rendered, and, upon filing this bond, to have judgment thereon rendered in his favor, against the principal and sureties hereon, for the full amount of any such judgment, including all costs, damages, expenses and counsel fees as the said may have incurred in the said action, as well as counsel fees for advice, and expense of keeping or storing property kept hereinunder. And the principal and sureties hereto expressly waive any notice of any such application and consent to the entry of such judgment, consenting and stipulating also that the estimate of said as to the amount of expenses, counsel fees, storage and the like, shall be final, binding and conclusive. The remedies herein provided shall not exclude any other legal relief, but are cumulative to the other rights, legal and equitable, of said In case of any recovery against said, growing out of the seizure or detention of the property herein mentioned, then, in any proceeding by said upon this bond, any defense based upon illegality of the consideration hereof, or the unlawfulness of the act or acts of said, as sheriff or otherwise, is hereby expressly waived.

Sealed and delivered in presence of

§ 877. Notice of sheriff's sale of personal property. (*California.*)

..... }
 vs. }

Under and by virtue of an execution issued out of the Court of the County of, State of, and to me directed and delivered for a judgment rendered in said court, on the day of, A. D. 19.., in favor of, and against, for the sum of \$....., in, together with costs of suit and interest, I have levied on all the right, title, claim and interest of said defendant, of, in and to the following property, to wit: (description).

Notice is hereby given that on, the day of, A. D. 19.., at o'clock .. M., of said day, I will sell all the right, title and interest of said, or either of them, in and to the above described property, or so much thereof as may be necessary to satisfy plaintiff's claim, besides all costs, interest and accruing costs.

The sale will take place at, at public auction, for cash in hand, to the highest and best bidder.

Dated,, 19..

....., Sheriff.

By, Deputy Sheriff.

§ 878. Certificate of sale of personal property.

I,, Sheriff of the County of, State of, do hereby certify that, under and by virtue of an execution issued out of the Court of the said County of in a certain action lately pending in said court, at the suit of, plaintiff, against

...., defendant, attested the day of, 19.., by which I was commanded to make the sum of dollars, with interest and costs, to satisfy the judgment in said action out of the personal property of said defendant if sufficient personal property could be found, all as more fully appears by the said writ, reference thereunto being hereby made; I have levied on, and on the day of, 19.., at .. o'clock, A. M., at the Court House door in the City of in said County of, duly sold at public auction, according to law, and after due and legal notice, to, who made the highest bid therefor at such sale, for the sum of \$. in coin, which was the whole price paid therefor, all the right, title and interest of the said judgment debtor,, in and to the following described personal property, to wit: (description of property).

Dated, this day of, 19..

....., Sheriff.

By, Deputy Sheriff.

§ 879. **Certificate of sale of corporate stock.**

I,, Sheriff of the County of, State of, do hereby certify that, under and by virtue of the final judgment and decree of the Court of the County of, State of, in a certain action lately pending in said court, at the suit of, plaintiff, and against, defendant, duly certified to me under the seal of said Superior Court on the day of, 19.., and to me, as such sheriff, duly directed and delivered, whereby I was commanded to sell the hereunto annexed certificate of stock according to law, and apply the proceeds of

such sale towards the satisfaction of the judgment in said action, amounting to the sum of \$. . . ., in United States gold coin, with interest and costs of suit; on the day of, 19.., at o'clock, .. M., at the Court House door, in the said County of, I duly sold at public auction, according to law, and after due and legal notice, to, who made the highest bid therefor, at such sale, for the sum of \$. . . ., in United States gold coin, which was the whole price paid for, the hereunto annexed certificate of stock in said order of sale described.

Given under my hand, this day of, 19..
, Sheriff.

By, Deputy Sheriff.

§ 880. Order for levy and sale of real estate.

In the Court of the County of, State of

.
vs.
 }

To, Sheriff of County:

You are hereby instructed to levy upon and sell, by virtue of the accompanying writ, in the above entitled suit, the following described property, standing on the records of County in the name of (description).

.,
 Attorney for Plaintiff.

Dated,, 19..

§ 881. Notice of levy on real estate under execution. (*California.*)

[TO ATTACH TO COPY OF WRIT.]

Sheriff's Office, }
 County of } ss.

Notice is hereby given that, under and by virtue of a writ of execution, issued out of the Court of the County of, State of, of which the annexed writ is a true copy, I have this day attached and levied upon all the right, title, claim and interest of, defendant., or either of them, of, in and to the following described real estate, standing on the records of County in the name of, and particularly described as follows: (description of property).

., Sheriff.

By, Deputy Sheriff.

Dated,, 19..

§ 882. Notice of sale of real estate under execution. (*California.*)

. }
 vs. } No.... Sheriff's Sale.
 }

By virtue of an execution issued out of the Court of the County of, State of, wherein, plaintiff, and, defendant, upon a judgment rendered the day of, A. D. 19.., for the sum of dollars, United States gold coin, besides costs and interest, I have this day levied upon all the right, title, claim and interest of said defendant,, of, in and to the following described real estate, to wit: (description).

Public notice is hereby given that I will, on, the day of, A. D. 19.., at o'clock .. M.

of said day, in front of the Court House door of the County of, sell at public auction, for United States gold coin, all the right, title, claim and interest of said defendant,, of, in and to the above described property, or so much thereof as may be necessary to raise sufficient money to satisfy said judgment, with interest and costs, etc., to the highest and best bidder.

., Sheriff.

By, Deputy Sheriff.

Dated,, 19..

§ 883. Notice of foreclosure sale by sheriff.

.....	} No.... Sheriff's Sale.
vs.	
.....	

Under and by virtue of an order of sale and decree of foreclosure and sale, issued out of the Court of the County of, of the State of, on the day of, A. D. 19.., in the above entitled action, wherein, the above named plaintiff, obtained a judgment and decree of foreclosure and sale against, defendant, on the day of, A. D. 19.., for the sum of dollars, in United States gold coin, besides interest, costs, and counsel fees, which said decree was, on the day of, A. D. 19.., recorded in judgment book of said court, at page, I am commanded to sell th.. certain lot, piece or parcel of land, situate, lying and being in County of, State of, and bounded and described as follows: (description).

Public notice is hereby given that, on, the

.... day of, A. D. 19.., at ... o'clock .. M. of that day, in front of the Court House door of the County of, I will, in obedience to said order of sale and decree of foreclosure and sale, sell the above described property, or so much thereof as may be necessary to satisfy said judgment, with interest and costs, etc., to the highest and best bidder, for gold coin of the United States.

Dated,, 19..

....., Sheriff.

By, Deputy Sheriff.

§ 884. **Notice of sale by commissioner.** (*California.*)

..... }
 vs. } No. Commissioner's Sale.
 }

Under and by virtue of a judgment and decree of foreclosure and an order of sale issued out of the Court of the County of, State of California, on the day of, A. D. 19.., in the above entitled action, wherein, the above named plaintiff, obtained a judgment and decree of foreclosure and sale against, defendant, on the day of, A. D. 19.., for the sum of dollars in gold coin of the United States, besides interest, costs and counsel fees, which said decree was, on the day of, A. D. 19.., recorded in judgment book of said court, at page, I am commanded to sell: (description of property).

Public notice is hereby given that on, the day of, A. D. 19.., at ... o'clock .. M. of that day, in front of the Court House door of the

County of, I will, in obedience to said judgment, decree and order of sale, sell the above described property, or so much thereof as may be necessary to raise sufficient money to satisfy said judgment and decree, with interest and costs, etc., to the highest and best bidder, for gold coin of the United States.

Dated,, 19..

., a Commissioner
appointed by said Court.

§ 885. **Certificate of execution sale of real estate.**
(*California.*)

In the Court of the County of,
State of

. }
vs. }
. }

I,, Sheriff of the County of, do hereby certify that by virtue of an execution in the above entitled case, attested the day of, 19.., by which I was commanded to make the amount of dollars, to satisfy the judgment in said action, with costs and interest thereon, out of the personal property of, the above defendant., and if sufficient personal property could not be found, then out of the real property belonging to the said, on the day of, A. D. 19.., or at any time thereafter, as by the said writ, reference being thereunto had, more fully appears; I have levied on and this day sold at public auction, according to the statute in such cases made and provided, to, who was the highest bidder, for the sum of dollars,, which was the whole price paid by him for the

dollars, on the day of, A. D. 19.., at . . . o'clock, . . M., at the Court House door, in the City of, in the said County of, I duly sold at public auction, according to law, and after due and legal notice, to, who made the highest bid therefor at such sale, for the sum of dollars, in United States gold coin,, which was the whole price paid, the real estate in said order of sale described, as follows, to wit: (description of property sold).

And I do hereby further certify that the said property was sold in lots or parcels, as follows: Lot 1 in Block 5 was sold to for \$1,000, United States gold coin. Lot 2 in Block 5 was sold to for \$800, United States gold coin. That the said sum of dollars, in United States gold coin, was the highest bid made, and the whole price paid therefor.

And that the same is subject to redemption, in United States gold coin, pursuant to the statute in such cases made and provided.

Dated at, this day of, A. D. 19..

., Sheriff.

By, Deputy Sheriff.

§ 887. **Certificate of redemption of real estate.**

State of }
County of } ss.

I,, Sheriff of the County of, State of, do hereby certify that on the . . day of, 19.., Mary Jucksch, judgment debtor under the judgment in the action hereinafter mentioned, in due form of law, tendered and paid to me the sum of \$188, being in full payment of the purchase price

paid by the purchaser at the sale of the real property hereinafter described, made by me on the day of, 19.., under the decree of foreclosure and sale, issued to me out of the Superior Court of the City and County of San Francisco, State of California (No. 22764), in the action of *La Societe Francaise d'Epargnes et de Prevoyance Mutuelle vs. The Berkeley Land and Town Improvement Association, Mary Jucksch et al.*, including one per cent per month interest thereon, up to the time of redemption, together with the amount of all taxes and assessments paid by the purchaser on said property, after said purchase, and interest thereon. That, thereupon, I received said sum of money so tendered and paid as aforesaid, and have granted and executed to said Mary Jucksch this, my certificate of redemption of said property, in conformity with the statute in such case made and provided. The premises so redeemed, or intended to be redeemed, are described as follows, to wit: (description).

In witness whereof, I have hereunto set my hand this day of, 19..

., Sheriff.

By, Deputy Sheriff.

§ 888. **Receipts to sheriff.**

\$ Oakland,, 19..

Received from, Sheriff of County,, in United States gold coin, being the amount of sale of real estate in the case of, Superior Court, County of, after deducting sheriff's costs and disbursements, amounting to \$

.,

Plaintiff's Attorney.

§. Oakland, , 19. .
 Received from , Sheriff of County,
¹⁰⁰ dollars, in United States gold coin, being the
 amount of judgment, interest, costs, etc., due plain-
 tiff, , in the case of vs. , Superior Court,
 County of ,
 Plaintiff's Attorney.

§ 889. **Deed under execution sale.** (*California.*)

THIS INDENTURE, made this day of ,
 A. D. 19. . , between , Sheriff of the County of
 , of the first part, and , of the County
 of , and State of , of the second part:—

Whereas, by virtue of a writ of execution issued
 out of, and under the seal of, the Court of the
 County of , State of , attested the day
 of , A. D. 18. . , upon a judgment recovered in
 said court on the day of , A. D. 19. . , in favor
 of , and against , to the said sheriff directed
 and delivered, commanding him that of the personal
 property of the said judgment debtor in his county,
 he should cause to be made certain moneys in the said
 writ specified, and if sufficient personal property of
 the said judgment debtor could not be found, that
 then he should cause the amount of said judgment
 to be made out of the lands, tenements and real prop-
 erty belonging to him on the day of , A. D. ¹³
 19. . , or at any time afterwards;

And, whereas, because sufficient personal property
 of the said judgment debtor could not be found,
 whereof he, the said sheriff, could cause to be made
 the moneys specified in said writ, he, the said sheriff,
 did, in obedience to said command, levy on, take and
 seize all the estate, right, title and interest which the

said judgment debtor so had of, in and to the lands, tenements, real estate and premises hereinafter particularly set forth and described, with the appurtenances, and did, on the day of, A. D. 19. ., sell the said premises, at public auction, at the Court House door, in the City of, County of, between the hours of nine in the morning and five in the afternoon of that day, namely: at . . . o'clock . . . M., after first having given notice of the time and place of such sale, by advertising the same according to law; at which sale the said premises were struck off and sold to, for the sum of, United States gold coin, he, the said, being the highest bidder, and that being the highest sum bid, and the whole price paid for the same;

And, whereas, the said sheriff, after receiving from said purchaser the said sum of money so bid as aforesaid, gave to him such certificate as is by law directed to be given, and filed in the office of the recorder of the County of a duplicate of such certificate;

And, whereas, twelve months after such sale have expired without any redemption of the said premises having been made;

Now this indenture witnesseth, that I,, the sheriff aforesaid, and party hereto of the first part, by virtue of said writ, and in pursuance of the statute in such case made and provided, for and in consideration of the sum of money above mentioned, to him in hand paid, as aforesaid, by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, conveyed and confirmed, and by these presents doth grant, bargain, sell, convey and confirm unto the said, his

heirs and assigns, all the estate, right, title and interest of the said, which had on the said day of, A. D. 19.., or at any time afterwards, or now of, in and to all the following described premises, viz.: (description), together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, to have and to hold the said above mentioned and described premises, with the appurtenances, unto the said, heirs and assigns forever, as fully and absolutely as he, the sheriff aforesaid, can, may or ought to, by virtue of the said writ, and of the statute in such case made and provided, grant, bargain, sell, release, assign, convey and confirm the same.

In witness whereof, the said sheriff, the party of the first part to these presents, hath hereunto set his hand and seal the day and year first above written.

Sealed and delivered in	}	
the presence of	,
.		Sheriff of the County of
	, State of

§ 890. Sheriff's deed under foreclosure sale.
(*California.*)

THIS INDENTURE, made the day of, in the year of our Lord one thousand nine hundred and, between, Sheriff of the County of, State of, the party of the first part, and, the part.. of the second part, witnesseth:

Whereas, in and by a certain judgment or decree, made and entered by the Court of the County of, State of, on the day of A. D. 19.., in a certain action then pending in said court, wherein was plaintiff, and was

defendant, and of which said judgment or decree a certified copy, with an order of sale from said court, was delivered to said party of the first part, as such sheriff, for execution, it was among other things ordered, adjudged and decreed, that all and singular the mortgaged premises described in the complaint in said action, and specifically described in said judgment or decree, should be sold at public auction by the sheriff of the said County of, in the manner required by law, and according to the course and practice of said court; that such sale be made, in the said County of, between the hours of nine o'clock in the forenoon and five o'clock in the afternoon on such day as the said sheriff should appoint, that any of the parties to said action might become the purchaser at such sale; and that said sheriff should execute the usual certificates and deeds to the purchaser or purchasers, as required by law;

And, whereas, the said sheriff did at the hour of o'clock . . M., on the day of, A. D. 19. ., after due public notice had been given, as required by the laws of this State, and the course and practice of said court, duly sell at public auction in the said County of, agreeably to said judgment or decree, and the provisions of law, the premises in the said decree or judgment mentioned, at which sale the premises in said judgment or decree, and hereinafter described, were fairly struck off to the said, the said part. . hereto of the second part, for the sum of dollars, being the highest bidder, and that being the highest sum bid for the same;

And, whereas, the said thereupon paid to the said sheriff the sum of money so bid by;

And, whereas, the said sheriff thereupon made and issued the usual certificate in duplicate of the said sale in due form of law, and delivered one thereof to the said purchaser,, and caused the other to be filed in the office of the County Recorder of said County of ;

And, whereas, more than twelve months have elapsed since the date of said sale, and no redemption has been made of the premises so sold as aforesaid, by or on behalf of the said judgment debtor, the said, or by or on behalf of any other person, (recital of any assignment that may have been made).

Now this indenture witnesseth: That the said party of the first part, the said sheriff, in order to carry into effect the sale so made by him as aforesaid, in pursuance of said judgment or decree, and in conformity to the statute in such case made and provided, and also in consideration of the premises and of the said sum of dollars, so bid and paid to him by the said purchaser,, the said, the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto the said part. . of the second part, and to heirs and assigns forever, all th. . certain lot. ., piece. . or parcel. . of land situate, lying, and being in the said County of, State of, and bounded and particularly described as follows, to wit: (description). Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title and

interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, and of said defendant,, of, in and to the said premises, and every part and parcel thereof.

To have and to hold, all and singular, the said premises hereby conveyed, or intended so to be, together with the appurtenances, unto the said part.. of the second part, heirs and assigns, to own proper use, benefit and behoof forever.

In witness whereof, the said party of the first part to these presents, has hereunto set his hand and seal the day and year first above written.

Signed, sealed and delivered in the presence of	},
.....		Sheriff of the County of, State of

§ 891. Notice of creditors' meeting after assignment by debtor. (*California.*)

Sheriff's Office, } ss.
County of

.....,, 19..

Notice is hereby given that a meeting of the creditors of will be held at my office, in the City of, County of '....., State of, on ..day, the day of, 19.., at ... o'clock, .. M., for the purpose of electing one or more assignees in my place and stead as assignee of said, for the benefit of creditors.

Dated,, 19.., .

Sheriff of the County of

§ 892. **Assignment by sheriff for benefit of creditors.** (*California.*)

THIS INDENTURE, made this day of, 19.., by and between, Sheriff of the County of, State of California, as such sheriff, and witnesseth:

That, whereas, on the day of, 19..,, in pursuance of the provisions of Division IV, Title 3, Part 2, of the Civil Code of California, did assign to said sheriff his property for the benefit of his creditors, which assignment was in writing and was duly recorded in the office of the County Recorder of said County on the .. day of, 19..;

And, whereas, the sheriff did thereupon cause a notice of a meeting of the creditors of said to be sent by mail to each creditor named, and to the address given in said assignment, and which specified the amount owing to such creditor, as set forth in said assignment, and notified them to meet at his office in, County of, State of, on day, the day of, 19.., at ... o'clock .. M. of that day, for the purpose of electing an assignee or assignees, in his place and stead, as assignee of the property of said;

And, whereas, said sheriff did cause a notice of said meeting of creditors to be published for one time in the, a newspaper published in said, County, which county was and is the place of residence of said;

And, whereas, at the meeting of the creditors of said, held in pursuance of the aforesaid notices, which were given and published as required by law in such cases made and provided, the said, by a

majority, in amount of the demands against the said, present and represented by proxy, was duly elected assignee in accordance with the aforesaid provisions of the said Civil Code;

Now, therefore, in consideration of the premises, and in pursuance of the law in such cases made and provided, I,, Sheriff as aforesaid, do, as such sheriff, hereby convey, assign and set over to said, as such assignee, and to his successors and assigns, upon the trusts provided in said title, all and singular the property of every kind and description so as aforesaid assigned to me by the said

In witness whereof, I have hereunto set my hand and seal this day of, 19..

Signed, sealed and delivered in the presence of	}, Sheriff of the County of, State of
.		

§ 893. **Application for requisition.**

To the Hon. . . ., Governor of the State of:

The undersigned respectfully makes this his application for a requisition upon the Governor of the State of for the person of, a fugitive from justice from this State, whose alleged crime is set out in the affidavit and warrant accompanying this application, and requests the appointment by your Excellency of as a suitable person to receive and bring back to this State said fugitive from justice.

Dated,, 19..

Subscribed and sworn to before me }
 this day of, 19..

Sheriff's Office,,
, 19..

Sir: Having been regularly drawn as such, you are hereby summoned to attend the Superior Court, Department No., of County, at the Court House, in the City of, in said county, on,

the day of, A. D. 19.., at . . . o'clock . . M. of that day, then and there to serve as a trial juror for the session of said court.

Herein fail not, under penalty of the law.

., Sheriff.

By, Deputy Sheriff.

§ 896. **Special jury summons.** (*California.*)

Sheriff's office,,
. . . ., 19..

MR.

Sir: You are hereby summoned to attend the Superior Court, Department No., of County, at the Court House, in the City of, in said county, on, the day of, A. D. 19.., at . . . o'clock . . M. of that day, then and there to serve as a trial juror for the session of said court.

Herein fail not, under penalty of the law.

., Sheriff.

By, Deputy Sheriff.

§ 897. **Grand jury summons.** (*California.*)

Sheriff's Office,,
. . . ., 19..

MR.

Sir: Having been regularly drawn as such, you are hereby summoned to be and appear in the court room of Department of the Superior Court of the County of, in the Court House of said county, on day, the day of, A. D. 19.., then and there to serve as a grand juror.

Herein fail not, under penalty of the law.

., Sheriff.

By, Deputy Sheriff.

§ 898. **Monthly statement of fees to auditor.**
(*California.*)

Sheriff's Office, }
County of } ss.

I,, Sheriff of said county, hereby certify that the total amount of fees due from me to the county treasury of said county, for the month of, 19.., as shown by the fee book in my office, is dollars (\$¹⁰⁰)., Sheriff.

By, Deputy Sheriff.

State of, }
County of } ss.

I,, do swear that the fee book in my office contains a true statement, in detail, of all fees and compensation of every kind and nature, for official services rendered by me, my deputies and assistants, for the month of, A. D. 19.., and that said fee book shows the full amount received or chargeable in said month and since my last monthly payment; and neither myself, nor, to my knowledge or belief, any of my deputies or assistants, have rendered any official service, except for the county, which is not fully set out in said fee book, and that the foregoing statement thereof is true and correct.

Subscribed and sworn to before me, }
this day of, 19.. }

§ 899. **Semi-annual statement of fees to auditor.**
(*California.*)

Sheriff's Office, }
County of } ss.

I hereby certify that the amount of fees earned, collected or chargeable by me, as, for the six months ending, 19.., is dollars (\$....).

Witness my hand this day of, 19..

....., Sheriff.

State of, }
County of } ss.

I,, Sheriff of the County of, do swear that the foregoing statement is true and correct.

Subscribed and sworn to before me, }
this, day of, 19.. }

.....

.....

§ 900. **Monthly statement of jailer to county auditor.** (*California.*)

LIST OF PRISONERS CONFINED IN THE COUNTY JAIL
OF ... COUNTY DURING THE MONTH OF ..., 19.

Names.	No. of Days.	Remarks.
.....

State of, }
County of } ss.

I,, Sheriff of the County of, do swear that the foregoing statement is true and correct.

Subscribed and sworn to before me, }
this ... day of, 19.. }

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